REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	May 95	

4. TITLE AND SUBTITLE
State Air Pollution Permit Program Under Subchapter V of the Clean Air Act as of August 8,1995

5. FUNDING NUMBERS

6. AUTHOR(S)
John Michael Smith

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
AFIT Students Attending:

The Delaware Law School of Widener University

8. PERFORMING ORGANIZATION REPORT NUMBER
AFIT/CI/CIA
95-75

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
DEPARTMENT OF THE AIR FORCE
AFIT/CI
2950 P STREET, BLDG 125
WRIGHT-PATTERSON AFB OH 45433-7765

10. SPONSORING/MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for Public Release IAW AFR 190-1
Distribution Unlimited
BRIAN D. Gauthier, MSgt, USAF
Chief Administration

12b. DISTRIBUTION CODE

13. ABSTRACT *(Maximum 200 words)*

19950912 014

14. SUBJECT TERMS	15. NUMBER OF PAGES
	158
	16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

State Air Pollution Permit Programs under Subchapter V of the Clean Air Act
as of August 8, 1995

By
John Michael Smith

B.A. May 1981, Ursinus College
J.D. May 1985, The Delaware Law School of Widener University

A Thesis submitted to

The Faculty of

The National Law Center

of The George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws

September 30, 1995

Thesis directed by
Arnold W. Reitze, Jr.
Professor of Law

I ____ *1*

Historical and Legal Background of the Federal Air Pollution Permit Program under the Clean Air Act Amendments of 1990 ____ **1**

A. Legislative History of the Clean Air Act Permit Program ____ 1
B. Statutory Requirements under Subchapter V of the Clean Air Act ____ 3
C. Hazardous Air Pollutants and the Permit Program ____ 11

II ____ *14*

Federal Regulations which implement the Clean Air Act Permit Programs ____ **14**

A. Scope of the Permit Program and Application. ____ 14
B. Requirements for State Permitting Program Submittals ____ 18
C. Minimum Permit Application and Content Requirements ____ 21
D. Actions by Permitting Authorities with Respect to Permits ____ 25
E. Permit review by EPA and Affected States ____ 27
F. Fee Determination, Oversight, Sanctions and Enforcement Requirements ____ 28
G. Hazardous Air Pollutants and State Permitting Programs ____ 30
H. Other Proposed and Implemented Regulations which affect the State Permitting Programs ____ 32

III ____ *34*

State and Local Permitting Programs that are Approved or Proposed for Full Approval ____ **34**

A. Mississippi ____ 34
B. South Carolina ____ 37
C. Utah ____ 39
D. Louisiana ____ 41
E. Ohio ____ 45
F. Nebraska ____ 47
G. Kansas ____ 48

IV ____ *52*

Programs with Interim Approval or that have been proposed for Interim Approval ____ **52**

A. Washington State ____ 53
B. New Mexico ____ 60
C. Oregon ____ 63
D. Hawaii ____ 66
E. Arkansas ____ 68
F. Wisconsin ____ 69
G. Colorado ____ 74
H. Wyoming ____ 76
I. Illinois ____ 79
J. South Dakota ____ 82
K. Nevada ____ 83
L. Montana ____ 88
M. Minnesota ____ 92
N. District of Columbia ____ 95
O. Iowa ____ 97
P. Indiana ____ 100
Q. North Dakota ____ 101
R. Oklahoma ____ 104
S. Texas ____ 107
T. Tennessee ____ 111
U. Florida ____ 112

V. Arizona ____ 114

V ____ ***120***

California Subchapter V Permit Programs ____ **120**
A. Statutory Authority and Statewide Issues ____ 120
B. Ventura County Air Pollution Control District ____ 122
C. Four Local Districts ____ 123
D. Bay Area Air Quality Management District ____ 127
E. Nineteen Local Programs ____ 129
F. Monterey Bay Unified Air Pollution Control District ____ 136
G. Sacramento Metropolitan Air Quality Management District ____ 137
H. Mojave Desert Air Quality Management District ____ 139
I. Santa Barbara County Air Pollution District ____ 140

VI ____ ***143***

Disapproved Programs, the Tenth Amendment, and Standing ____ **143**
A. Virginia ____ 143
B. The Tenth Amendment and Subchapter V ____ 147

VII ____ ***152***

Indian Lands, Litigation and the Future ____ **152**
A. Indian Lands ____ 152
B. Litigation ____ 154
C. The Future ____ 156

I

Historical and Legal Background of the Federal Air Pollution Permit Program under the Clean Air Act Amendments of 1990

A. *Legislative History of the Clean Air Act Permit Program*

The Clean Air Act Amendments of 1990 imposed the requirement for a comprehensive set of state Air Pollution permit programs on a Nationwide basis for the first time.[1] Prior to the passage of this law, there were about thirty-five state permit programs, and they were not subject to Federal supervision.[2] During the debate in the House of Representatives it was stated that the purpose of the permit program was to "clarify and make more enforceable a source's pollution control requirements. Under existing law, pollution control obligations may be scattered throughout many obscure and ambiguous state and federal regulations. ... It is much easier for a source to understand its obligations, and for the state to enforce them, if all of a source's obligations are combined into one permit."[3] Congressman Waxman went on to observe that this program would enhance the accountability of sources, relieve the administrative burden of the several states under the watchful eye of the Federal government. In addition, the Congress wanted to encourage public involvement in the process so that "interested citizens will be able to review and help enforce a source's obligations under the Act."[4]

Sentiments regarding the creation of the permit program were similar in the Senate. "The permits will serve the very useful function of gathering and reciting in one place--the permit document

---

[1] 136 Cong. Rec. H 2543 (daily edition of May 23, 1990) (statement of Rep. Waxman) *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 2565 (1993)

[2] *Id.* 136 Cong. Rec. H2544, *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 2565 (1993).

[3] *Id.* 136 Cong. Rec. H2544, *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 2566 (1993).

[4] *Id.*

itself-- all of the duties imposed by the Clean Air Act upon the source that holds the permit. This would clearly be an improvement over the present system, where both the source and EPA must search through numerous provisions of State implementation plans and regulations to assemble a complete list of requirements that apply to any particular plant."[5]

The Clean Air Act Amendments went through a lengthy debate process in both houses. One of the important provisions of the act that was added in by amendment from the House of Representatives was the imposition of a deadline which required that the state permit programs be running within four years and six months of the enactment of the act.[6] In addition, the law created a staggered system for the consideration and approval of permits at the state level. "In order to avoid a logjam of permit applications, we have added to S. 1630 a provision that would allow the permitting agencies to established a phased priority system for the submission of permits over a period of 2 1/2 years. This process would begin at the point of 4 1/2 years after we enact this legislation."[7]

From this desire to create a uniform nationwide permitting program was born Subchapter V of the Clean Air Act.[8] The Act itself established the procedures for the creation of the permit program and gave broad authority to the EPA administrator to establish criteria for the minimum requirements for the various state programs that would have to meet these standards established by Subchapter V.

---

[5] 136 Cong. Rec. S 205, 213, (daily ed. of January 24, 1990) (statement of Sen. Chaffee) *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 4858(1993).

[6] 136 Cong. Rec. S 2030, 2106, (daily ed. of March 5, 1990) (statement of Sen. Chaffee) *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 5194 (1993).

[7] 136 Cong. Rec. S 2030, 2106, (daily ed. of March 5, 1990) (statement of Sen. Chaffee) *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 5195 (1993).

[8] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title V, §§501-507, 104 Stat. 2635-2648 (1990) codified at 42 U.S.C.A. §§ 7661-7661f [Clean Air Act (CAA) §§501-507]. (1983-1995).

B. Statutory Requirements under Subchapter V of the Clean Air Act

Section 501[9] of the Clean Air Act is the definitional section of Subchapter V. The significant definitions that apply to Subchapter V include an "affected source" as set forth in Subchapter IV of the Clean Air Act.[10] A major source is "any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter."[11]

This definition of a major source includes those that are Hazardous Air Pollutants, which are "any stationary source or group of stationary sources located within a contiguous area under common control that emits or has the potential to emit considering controls, in the aggregate 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants."[12] The other major source definition is set forth in Section 302 of the Clean Air Act.[13] This includes any source which "directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule of the Administrator)."[14]

Section 502[15] mandates the creation of state permit programs. It prohibits the violation of any permit after the approval of a state permit program and designates the sources required to obtain a

---

[9] CAA §501, 42 U.S.C.A. 7661 (1983-1995)..

[10] CAA §402(a), 42 U.S.C.A. §7651a(1) (1983-1995).

[11] CAA §501(2), 42 U.S.C.A. §7661a(2) (1983-1995).

[12] CAA §112(a)(1), 42 U.S.C.A. §7412(a)(1) (1983-1995).

[13] CAA §302(j), 42 U.S.C.A. §7602(j) (1983-1995).

[14] *Id.*

[15] CAA §502, 42 U.S.C.A. §7661a (1983-1995).

permit.[16] The Administrator of the Environmental Protection Agency (hereafter referred to as the "Administrator") may exempt "one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements."[17]

Section 502(b) requires the administrator to promulgate regulations which set forth the minimum requirements for a valid permit program.[18] The elements delineate standards for permit applications. These standards must include "a standard application form and criteria for determining in a timely fashion the completeness of applications;"[19] and "monitoring and reporting requirements."[20] In addition, the statute mandates that the permit program be self sufficient and sets forth an elaborate scheme for fee requirements which would cover all supervisory regulatory costs for the permitted source.[21] The program establishes a minimum presumptive permit fee of "$25 per ton of each regulated pollutant"[22] or such other formula which the Administrator "determine[s] adequately reflects the reasonable costs of the permit program."[23] The Administrator may collect fees in accordance with the statute if the putative state program does not collect an adequate fee, and all permit fees collected by a program must be used to support the program.[24] The program must have adequate personnel to

---

[16] CAA §502(a), 42 U.S.C.A. §7661a(a) (1983-1995).

[17] *Id.*

[18] CAA §502(b), 42 U.S.C.A. §7661a(b) (1983-1995).

[19] CAA §502(b)(1), 42 U.S.C.A. §7661a(b)(1) (1983-1995).

[20] CAA §502(b)(2), 42 U.S.C.A. §7661a(b)(2) (1983-1995).

[21] CAA §502(b)(3)(A), 42 U.S.C.A. §7661a(b)(3)(A) (1983-1995).

[22] CAA §502(b)(3)(B)(i), 42 U.S.C.A. §7661a(b)(3)(B)(i) (1983-1995). A regulated pollutant is defined as:

(I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference)."

CAA §502(b)(3)(B)(ii), 42 U.S.C.A. §7661a(b)(3)(B)(ii) (1983-1995)

[23] CAA §502(b)(3)(B)(i), 42 U.S.C.A. §7661a(b)(3)(B)(i) (1983-1995).

[24] CAA §502(b)(3)(C), 42 U.S.C.A. §7661a(b)(3)(C) (1983-1995).

execute a permit program.[25] Elaborate criteria are established for the powers of the permitting authority with respect to the issuance, terms, and enforcement of each individual permit, which must include the ability of the Administrator to veto a proposed permit if the Administrator finds a denial of a permit is necessary.[26]

The administrator must ensure that the program has procedures for expeditious processing of permit applications;[27] establishes criteria whereby an applicant may obtain judicial review of applications that are not acted upon, or are denied;[28] allow public access to permits and required documentation;[29] allow permitting authorities to reopen permits for major sources that have terms of more than three years for changes in applicable standards; and, allow for minor modifications of permitted facilities which do not increase allowable emissions, as long as there has been a minimum of seven days notice to the Administrator and the permitting authority of the putative change.[30] It is

---

[25] CAA §502(b)(4), 42 U.S.C.A. §7661a(b)(4) (1983-1995).

[26] The minimum elements for an approvable program are as follows: provides for the minimum elements to include the following authority:

(A) issue permits and assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

CAA §502(b)(5)(A-F), 42 U.S.C.A. §7661a(b)(5)(A-F) (1983-1995).

[27]CAA §502(b)(6), 42 U.S.C.A. §7661a(b)(6) (1983-1995).

[28] CAA §502(b)(7), 42 U.S.C.A. §7661a(b)(7) (1983-1995).

[29] The statute requires that a program have:

Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

CAA §502(b)(8), 42 U.S.C.A. §7661a(b)(8) (1983-1995).

[30] CAA §502(b)(9), 42 U.S.C.A. §7661a(b)(9) (1983-1995).

possible and it is encouraged that there be an issuance of one permit for a facility with multiple sources.[31]

While EPA was given until November 15, 1991 to promulgate the regulations required by Subchapter V,[32] the states were required to submit permit programs no later than November 15, 1993[33] to the Administrator. The submission must include a legal opinion from the state attorney general, or other legal officer for interstate or local programs, that the program has "adequate authority to carry out the program."[34] EPA has one year after receipt of the program to approve, disapprove, or execute some combination thereof on the program and any action by EPA on the program must be after there has been an opportunity for public notice and comment on the program.[35] If any portion of the program is disapproved, then the Governor of the state involved has 180 days to resubmit a program which adequately addresses EPA's concerns.[36]

Section 502(d)(2)[37] sets forth the penalties for failure to submit a program, or in the alternative makes the changes required for an approvable program.[38] The sanctions which must be executed if a state which to comply with the statute include the denial of federal highway funds or projects,[39] and

---

[31] CAA §502(c), 42 U.S.C.A. §7661a(c) (1983-1995).

[32] CAA §502(b), 42 U.S.C.A. §7661a(b) (1983-1995).

[33] CAA §502(d)(1), 42 U.S.C.A. §7661a(d)(1) (1983-1995).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] CAA §502(d)(2), 42 U.S.C.A. §7661a(d)(2) (1983-1995).

[38] The following method must be used to determine if sanctions must be imposed:

If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

CAA §502(d)(2)(B), 42 U.S.C.A. §7661a(d)(2)(B) (1983-1995)

[39] CAA §179(b)(1), 42 U.S.C.A. §7509(b)(1) (1983-1995).

then the mandating of a emissions offset for new or modified stationary sources of at least two to one in the non-complying state.[40]

EPA is required to establish its own program in a state which has no program as of November 15, 1995[41] EPA has the authority to suspend issuance of Federal permits in a jurisdiction if a state program is subsequently approved by the Administrator.[42] The Administrator may approve a partial program,[43] known as a "source category limited (SCL)" program, but the partial program, to meet minimum standards, must regulate sources of hazardous air pollutants under Section 112[44] and regulated sources under Subchapter IV, the acid deposition control provisions.[45] A partial program approval does not relieve a state of its obligation to submit a complete program, nor does it preclude the implementation of sanctions for failure to have a fully approved program in place.[46] The administrator may grant interim approval of a program for a period of up to two years, and this interim approval status is not renewable.[47] The Administrator may revoke the authority of a state to enforce a program if a determination is made "that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter."[48] A

---

[40] CAA §179(b)(2), 42 U.S.C.A. §7509(b)(2) (1983-1995).

[41] CAA §502(d)(2)(C)(3), 42 U.S.C.A. §7661a(d)(2)(C)(3) (1983-1995)

[42] CAA §502(e), 42 U.S.C.A. §7661a(e) (1983-1995).

[43] CAA §502(f), 42 U.S.C.A. §7661a(f) (1983-1995).

[44] CAA §112, 42 U.S.C.A. §7412 (1983-1995).

[45] CAA §§401-416, 42 U.S.C.A. §§7651-7651*o*, (1983-1995).

[46] CAA §502(f), 42 U.S.C.A. §7661a(f) (1983-1995).

[47] **(g) Interim approval**

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

CAA §502(g), 42 U.S.C.A. §7661a(g) (1983-1995).

[48] CAA §502(i), 42 U.S.C.A. §7661a(i) (1983-1995).

proposal to substitute a Federal program, or impose sanctions on an inadequate state program, is subject to notice and comment rule making, and the state has eighteen months after notice of the deficiencies to correct them.[49]

Section 503[50] specifies the requirements for the permit applications themselves. A covered source must have a permit within one year of when a state, local or federal program becomes effective in the area in which the source is located.[51] Permits issued to sources must specify compliance schedules for non-compliant sources, annual certifications of compliance with permit requirements and sources are required to report deviations.[52] Persons required to have a permit must submit an application within a year of the effectiveness of a program, unless otherwise required by the program itself, and a compliance plan is required in the application, if that is appropriate.[53] Permitting authorities are given up to eighteen months to act upon completed applications, except those submitted in the first year of a program, in which case, a prioritized schedule must be established which allows the phase in of the program over a three year period, with the higher priority being assigned to construction or modification applications.[54] Except for modification, or new construction permits, a source is in compliance with the statute if it has filed a complete application on a timely basis and the

---

[49] *Id.*

[50] CAA §503, 42 U.S.C.A. 7661b (1983-1995).

[51] CAA §503(a), 42 U.S.C.A. 7661b(a) (1983-1995).

[52] **(b) Compliance plan**

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

CAA §503(b)(1-2), 42 U.S.C.A. 7661b(b)(1-2) (1983-1995).

[53] CAA §503(c), 42 U.S.C.A. §7661b(c) (1983-1995).

[54] *Id.*

permitting authority has not acted on the permit application.[55] This exception does not apply if the reason for the delay is attributable to a dereliction on the part of the source.[56] Copies of permit applications and related documentation must be made available to the public,[57] but the source may request protection of trade secrets and similar information from the Administrator in accordance with applicable law.[58] Such information must still be submitted to the agency under a separate cover for a decision as to whether the information may be withheld from the public.[59]

Section 504[60] regulates the conditions of permits which must be specified with respect to emission limitations,[61] and monitoring and analysis requirements.[62] Permits must specify requirements with respect to "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions."[63] All documentation that is submitted with regard to a permit must be certified for accuracy.[64] A general permit may be issued to a facility which has numerous similar sources,[65] and there is a provision for temporary sources to obtain permits as well.[66] This section provides for the creation of a permit "shield" which creates a presumption of compliance with the statute if the terms and conditions of the permit are adhered to by the permittee.[67]

---

[55] CAA §503(d), 42 U.S.C.A. §7661b(d) (1983-1995).

[56] *Id.*

[57] CAA §503(e), 42 U.S.C.A. §7661b(e) (1983-1995).

[58] CAA §114(c), 42 U.S.C.A. §7414(c) (1983-1995).

[59] CAA §503(e), 42 U.S.C.A. §7661b(e) (1983-1995).

[60] CAA §504, 42 U.S.C.A. §7661c (1983-1995).

[61] CAA §504(a), 42 U.S.C.A. §7661c(a) (1983-1995).

[62] CAA §504(b), 42 U.S.C.A. §7661c(b) (1983-1995).

[63] CAA §504(c), 42 U.S.C.A. §7661c(c) (1983-1995).

[64] *Id.*

[65] CAA §504(d), 42 U.S.C.A. §7661c(d) (1983-1995).

[66] CAA §504(e), 42 U.S.C.A. §7661c(e) (1983-1995).

[67] **(f) Permit shield**

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if--

Section 505 contains the notification requirements for permitting authorities.[68] All permitting authorities must provide copies of each permit application, proposed permit and finally issued permits to the Administrator,[69] and to contiguous states whose air quality may be affected by the permit or who are within 50 miles of the proposed permitted source.[70] This provides an opportunity to make recommendations to the permitting authority proposing to issue the permit. If a permitting authority fails to accept the recommendations of the bordering state, the permitting authority "shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor."[71] The Administrator must object to the issuance of a permit if it is determined that the permit does not comply with the statute or with an applicable state implementation plan. Written notice of objections must be provided to the applicant and the permitting authority.[72] Any person may petition the Administrator to object to a permit. If the administrator elects not to object to the proposed permit, a denial of a request to object is judicially reviewable[73] in accordance with other provisions of the Clean Air Act.[74] If the Administrator does object to the proposed permit, it may not be issued, or if the permit has already been issued, the permit must then be

---

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

CAA §504(f)(1-2), 42 U.S.C.A. §7661c(f)(1-2) (1983-1995)

[68] CAA §505, 42 U.S.C.A. §7661d (1983-1995).

[69] CAA §505(a)(1), 42 U.S.C.A. §7661d(a)(1) (1983-1995).

[70] CAA §505(a)(2), 42 U.S.C.A. §7661d(a)(2) (1983-1995).

[71] CAA §505(a)(2)(B), 42 U.S.C.A. §7661d(a)(2)(B) (1983-1995).

[72] CAA §505(b)(1), 42 U.S.C.A. §7661d(b)(1) (1983-1995).

[73] CAA §505(b)(2), 42 U.S.C.A. §7661d(b)(2) (1983-1995).

[74] CAA §307, 42 U.S.C.A. §7607 (1983-1995).

modified or revoked in accordance with the objections of the Administrator.[75] The permitting authority has ninety days to issue an appropriately modified permit, or the Administrator will issue a Federal permit, and judicial review of the Administrator's action may not occur until there has been final action by the Administrator.[76] The notification and objection requirements may be waived by the Administrator for all sources except major sources,[77] and the Administrator may direct a permitting authority to revoke, modify, terminate or reissue a permit for cause, and if the permitting authority fails to execute the action as directed, the Administrator may execute the appropriate action in their own capacity.[78]

The provisions of Subchapter V authorize states to have more stringent permitting requirements than set forth in the Federal statute and require permits to implement the acid rain provisions of the Clean Air Act.[79] States are also required to alter their implementation plans to provide for a small business assistance program designed to share technologies that will enhance compliance by those small businesses with Subchapter V.[80]

C. Hazardous Air Pollutants and the Permit Program

The Clean Air Act Amendments of 1990 substantially changed and expanded the provisions relating to the regulation of hazardous air pollutants under Section 112.[81] This section had yet another definition of a "major source,"[82] and supplied a list of pollutants that were, by law, hazardous.[83] An

---

[75] CAA §505(b)(3), 42 U.S.C.A. §7661d(b)(3) (1983-1995).

[76] CAA §505(c), 42 U.S.C.A. §7661d(c) (1983-1995).

[77] CAA §505(d), 42 U.S.C.A. §7661d(d) (1983-1995).

[78] CAA §505(e), 42 U.S.C.A. §7661d(e) (1983-1995).

[79] CAA §506, 42 U.S.C.A. §7661e (1983-1995).

[80] CAA §507, 42 U.S.C.A. §7661f (1983-1995)

[81] CAA §112, 42 U.S.C.A. §7412 (1983-1995).

[82] **(1) Major source**

The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or

analysis of this section is important because state programs, in order to be granted even partial approval, must have as part of their permit program an acceptable portion which regulates hazardous air pollutants.[84] The Administrator is to promulgate emissions standards for new and existing sources. The emissions limitations for existing sources are determined according to an analysis of the best performing sources in particular categories as designated by the administrator.[85]

Another section that is of critical importance to the establishment of state permitting programs would be that of Section 112(g).[86] The statute makes separate provisions for modifications of regulated sources of hazardous air pollutants. A modification is defined, for purposes of this section as:

> **(5) Modification**
> The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.[87]

The term "de minimis" is not otherwise defined in the act. A source may use an offset to never-the-less effect a change in one operation which increases the emissions of a hazardous pollutant, and would otherwise be considered a "modification" as long as "such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the

---

more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

CAA §112(a)(1), 42 U.S.C.A. §7412(a)(1) (1983-1995).

[83] CAA §112(b), 42 U.S.C.A. §7412(b) (1983-1995).

[84] *See supra* note 44, and accompanying text.

[85] CAA §112(d)(3), 42 U.S.C.A. §7412(d)(3) (1983-1995).

[86] CAA §112(g), 42 U.S.C.A. §7412(g) (1983-1995).

[87] CAA §112(a)(5), 42 U.S.C.A. §7412(a)(5) (1983-1995).

quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator."[88] Persons may not modify existing sources unless there is a showing that the "maximum achievable control technology" (MACT) standard for this category is met after the effective date of a state permit program.[89] A similar requirement applies for new and reconstructed sources.[90]

The minimum requirements for a state program are found in Section 112(*l*).[91] Like the requirements for publication of regulations respecting the creation of state permitting programs, the Administrator was required to publish "guidance" in developing the programs required under this subsection. As with the Subchapter V regulations, this guidance was supposed to be published within one year of November 15, 1990.[92] Guidance in this area was not forthcoming in the time required by Congress and has had a major impact on state permit programs.

---

[88] CAA §112(g)(1)(A), 42 U.S.C.A. §7412(g)(1)(A) (1983-1995).

[89] CAA §112(g)(2)(A), 42 U.S.C.A. §7412(g)(2)(A) (1983-1995).

[90] CAA §112(g)(2)(B), 42 U.S.C.A. §7412(g)(2)(B) (1983-1995).

[91] CAA §112(*l*), 42 U.S.C.A. §7412(*l*) (1983-1995).

[92] CAA §112(*l*)(2), 42 U.S.C.A. §7412(*l*)(2) (1983-1995).

II

Federal Regulations which implement the Clean Air Act Permit Programs

A. Scope of the Permit Program and Application.

Faced with the statutorily mandated deadline of November 15, 1991,[1] to promulgate regulations which implemented Subchapter V, EPA proposed the new 40 C.F.R. Part 70 on May 10, 1991.[2] While this was a full six months before the deadline established in the Clean Air Act, a final regulation was not promulgated by EPA until July 21, 1992.[3] This removed eight months of valuable time for the state regulators and, more importantly, the state legislators to deal with the changes required in state regulatory programs, or even the necessity to create a permit program where none existed. The proposed regulation tracked the statute, and in some cases expanded upon the authority contained in the statute as authorized by Congress in the statute.

When establishing the permits program, EPA looked to lessons that were learned in the Clean Water Act[4] and the resulting proposals were "modeled on NPDES [National Pollution Discharge Elimination System] regulations in 40 C.F.R. parts 122, 123 and 124."[5] The proposed regulation contained a definition section which is notable for its definition of an applicable requirement. This proposed definition included requirements located in state implementation plans; preconstruction permits; regulations and statutes regulating hazardous air pollutants; acid rain provisions of the Clean

---

[1] CAA §502(b), 42 U.S.C.A. §7661a(b) (1983-1995). *See supra* part I, note 32, and accompanying text.

[2] Operating Permit Program, 56 Fed. Reg. 21,712 (1991) (to be codified at 40 C.F.R. Part 70) (proposed May 10, 1991).

[3] Operating Permit Program, 40 C.F.R. Part 70 (1994).

[4] 33 U.S.C.A. §§1251-1387 (1986-1995).

[5] 56 Fed. Reg. 21,713 (1991).

Air Act; monitoring, reporting, and certification requirements and solid waste incineration, among others.[6] This definition was substantially altered in the final regulation.[7]

The definition of "major source" was further clarified, and this expanded definition is important in determining who has to obtain a permit under Subchapter V and 40 C.F.R. Part 70.[8]

---

[6] The proposed definition of a requirement provided as follows:

(g) Applicable requirements or an applicable requirement of the Act include all of the following as they apply to emissions units in a part 70 source, unless the context of the regulation requires otherwise:
(1) Requirements of the applicable implementation plan approved or promulgated by EPA under title I of the Act that implement the relevant requirements of the Act, including any revisions to that plan, in part 52 of this chapter.
(2) Terms and conditions of any preconstruction permits issued pursuant to title I, part C or D of the Act.
(3) Requirements of any standard and any other requirements promulgated under section 111 of the Act.
(4) Requirements of any standard promulgated for hazardous air pollutants and any other requirements under section 112 of the Act.
(5) Requirements of the acid rain program under title IV of the Act and parts 72 through 79 of this chapter.
(6) Any monitoring, reporting, and certification requirements established pursuant to section 504(b) or section 114(a)(3) of the Act.
(7) Standards and regulations governing solid waste incineration, under section 129 of the Act.
(8) Standards and regulations for consumer and commercial products, under section 183(e) of the Act.
(9) Standards and regulations for tank vessels, under section 183(f) of the Act.
(10) Requirements of the program to control air pollution from Outer Continental Shelf sources, under section 328 of the Act.
(11) Requirements of the program to protect stratospheric ozone, under title VI of the Act.

Operating Permit Program, 56 Fed. Reg. 21,712 at 21,768 (1991) (to be codified at 40 C.F.R. §70.2(g)(1-11)) (proposed May 10, 1991).

[7] 40 C.F.R. §70.2 (1994). *See infra* notes 8-19 and accompanying text.

[8] The proposed definition of a requirement provided as follows:

(r) Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person or persons under common control) belonging to a single major industrial grouping and that is any of the following:

(1) A major source as defined in section 112 of the Act for the following:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule.

(ii) For radionuclides, such term shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers).

(ii) Kraft pulp mills.

(iii) Portland cement plants.

(iv) Primary zinc smelters.

(v) Iron and steel mills.

(vi) Primary aluminum ore reduction plants.

(vii) Primary copper smelters.

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day.

(ix) Hydrofluoric, sulfuric, or nitric acid plants.

(x) Petroleum refineries.

(xi) Lime plants.

(xii) Phosphate rock processing plants.

(xiii) Coke oven batteries.

(xiv) Sulfur recovery plants.

(xv) Carbon black plants (furnace process).

(xvi) Primary lead smelters.

(xvii) Fuel conversion plant.

(xviii) Sintering plants.

(xix) Secondary metal production plants.

(xx) Chemical process plants.

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input.

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels.

(xxiii) Taconite ore processing plants.

(xxiv) Glass fiber processing plants.

(xxv) Charcoal production plants.

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input.

(xxvii) All other stationary source categories regulated under section 111 or 112 of the Act.

(3) A major stationary source as defined in part D of title I of the Act including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tons or more per year of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as "severe," and 10 tons or more per year in areas classified as "extreme;" except that the references in this clause to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f) (1) or (2) of the Act, that such source shall not be subject to any requirement otherwise applicable to such source under section 182(f) of the Act.

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tons or more per year of volatile organic compounds.

(iii) For carbon monoxide nonattainment areas (A) That are classified as "serious," and (B) In which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tons or more per year of carbon monoxide.

(iv) For particulate matter (PM_{10}) nonattainment areas classified as "serious," sources with the potential to emit 70 tons or more per year of PM_{10} .

A stationary source or group of stationary sources shall be considered as part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources belong to the same Major Group (i.e., which have all the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 033-055-00176-0, respectively). Notwithstanding the other provisions of this subsection, the activities of any vessel shall not be considered part of a major source.

Unlike the definition of an "applicable requirement," the definition of a major source did not undergo a substantial change with the promulgation of the final regulation.[9] Another definition that could prove to be of importance would be to include "Indian Tribes" as the functional equivalent of states as designated by the Administrator.[10] The final definition of "state" did not explicitly mention Indian Tribes as states, but implicitly included them as the functional equivalent if the Indian Tribe became a permitting authority in its own right.[11] There are pending regulations dealing with Indian Tribe Air Quality management programs that will affect how the states can conduct business. This proposed regulation[12] will be discussed later in this paper.[13]

The program is applicable to all major sources as proposed to be defined in 40 C.F.R. Section 70.2, sources subject to regulation under sections 111 and 112 of the Clean Air Act, and any affected source as set forth in the Acid Rain Provisions of Subchapter IV-A,[14] but it also exempted a significant number of sources.[15] For non-attainment areas, states would have to submit an inventory of non-major sources which could emit pollutants or precursor pollutants affecting the area's non-attainment status and the state would have to demonstrate that the state could comply with its implementation plan.[16] The final regulation eliminated the requirement for an inventory of sources and requires that major sources or other regulated sources affected by Section 111 or Section 112 of the Clean Air Act be regulated by the State permitting program.[17] All other sources, with the exception of

---

Operating Permit Program, 56 Fed. Reg. 21,712 at 21,768-21,769 (1991) (to be codified at 40 C.F.R. §70.2(r)(1-3)) (proposed May 10, 1991).

[9] 40 C.F.R. §70.2 (1994).

[10] 56 Fed. Reg. 21,769-21,770 (1991) (to be codified at 40 C.F.R. §70.2) (proposed May 10, 1991).

[11] 40 C.F.R. §70.2, (1994).

[12] 59 Fed. Reg. 43,956 (1994).

[13] *See infra* Part VII.A.

[14] S*ee supra* part I, note 45 and accompanying text.

[15] 56 Fed. Reg. 21,770 (1991) (to be codified at 40 C.F.R. §70.3) (proposed May 10, 1991).

[16] 56 Fed. Reg. 21,770 (1991) (to be codified at 40 C.F.R. §70.3(b)(2)) (proposed May 10, 1991).

[17] [R]egulates the following sources:.(a) Part 70 sources. A State program with whole or partial approval under this part must provide for permitting of at least the following sources:

solid waste incinerators and sources subject to regulation as an "affected source" under the acid rain regulations are exempt from permitting requirements.[18] This exemption, in theory, is only supposed to last five years. EPA felt that requiring the permitting of non-major sources would be extremely burdensome for the state permitting authorities.[19] Permanent exemptions have been granted for wood burning stoves and the regulation of some asbestos pollutants.[20]

B. Requirements for State Permitting Program Submittals

The proposed 40 C.F.R. Section 70.4[21] set forth the requirements for a state program to be approved. These included submission of regulations and statutes that would implement the permit program, and a legal opinion from a qualified attorney (the state Attorney General, or the functional equivalent thereof for local programs) that would show how the state's laws and regulations complied with the Clean Air Act and 40 C.F.R. Part 70.[22] There were some substantial additions in the final

---

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

40 C.F.R. §70.3(a)(1-5) (1994).

[18] 40 C.F.R. §70.3(c) (1994).

[19] 57 Fed. Reg. 32,261-32,263 (1992)

[20] 40 C.F.R. 70.3(b)(4)(1994)

[21] 56 Fed. Reg. 21,770-21,773 (1991) (to be codified at 40 C.F.R. §70.4) (proposed May 10, 1991).

[22] The following points that must be addressed in the legal opinion:

(i) Issue permits that assure compliance with each applicable standard, regulation, or requirement under the Act by all sources required to have a part 70 permit.

(ii) Incorporate appropriate monitoring, recordkeeping, reporting, and compliance certification requirements into part 70 permits.

(iii) Issue permits for a fixed term of 5 years in the case of permits with acid rain provisions and issue all other permits for a period not to exceed 5 years except for permits issued for solid waste incineration units combusting municipal waste subject to section 129(e) of the Act.

regulation to the requirements for the certification by the Attorney General's opinion. These changes added requirements that there be an ability to obtain judicial review for failure to act by a permitting authority within ninety days of an application for a permit, renewal, or modification; provide this would be the sole opportunity for seeking judicial review; and, ensure that the state or local agency is not used to alter acid rain requirements.[23]

(iv) Issue permits for solid waste incineration units combusting municipal waste subject to section 129(e) of the Act for a period not to exceed 12 years and review such permits no less than every 5 years.

(v) Incorporate into permits emission limitations and all other applicable requirements, conditions, and prohibitions under the Act, including those in an applicable implementation plan.

(vi) Terminate, modify, or revoke and reissue permits for cause.

(vii) Enforce permits, permit fee requirements, and the requirement to obtain a permit, as specified in §70.11 of this part.

(viii) Make available to the public any permit application, compliance plan, permit, and monitoring and compliance report under section 503(e) of the Act, with the exception of that information entitled to confidential treatment pursuant to section 114(c) of the Act.

(ix) Not issue a permit for the purposes of part 70 if the Administrator timely objects to its issuance pursuant to §70.8(c) of this part.

(x) Provide an opportunity for judicial review in State court of the final permit by the applicant, any person who participated in the public comment process provided pursuant to § 70.7(i) of this part, and any other person who could obtain judicial review of such actions under State laws.

(xi) Ensure that the acid rain portions of permits for affected sources meet the requirements of parts 72 through 79 of this Chapter.

(xii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

(xiii) Issue and enforce general permits if the State seeks to implement the general permit program.

56 Fed. Reg. 21,771 (1991) (to be codified at 40 C.F.R. §70.4(b)(3)(i-xiii) (proposed May 10, 1991)

[23] (xi) Provide that, solely for the purposes of obtaining judicial review in State court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program. If the State program allows sources to make changes subject to post hoc review [as set forth in §§ 70.7(e)(2) and (3) of this part], the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State court.

(xii) Provide that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than 90 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.

(xiii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

40 C.F.R. §§70.4(b)(3)(x-xiii) (1994).

This section mandated reporting requirements with respect to actions taken against sources for violations of the act,[24] that required the states to describe the personnel and programs that would carry out the permit program, estimate of the costs involved in running the program for four years, describe in detail the procedures for dealing with permit renewals and ensure that preexisting permits would remain in effect while new permit applications are being evaluated.[25] EPA added provisions for trading of emissions which permit authorities would have to accommodate. This provision was not found in the original proposal.[26]

The proposed standards for partial approval[27] were virtually identical to Section 502(f) of the Clean Air Act.[28] The only significant change in the final regulation required local programs to comply with the standards enunciated in the regulation.[29]

The proposed regulations for interim approval were more comprehensive than the statute.[30] To obtain interim approval a program would have to demonstrate that adequate fees would be collected to fund the program, satisfy the permit term and requirements set forth in the regulation, allow for public participation in the permit process and provide that a permit would not be issued if EPA objected to the issuance of the permit.[31] The final regulation also required that a program contain provisions for allowing review by any affected states.[32]

---

[24] 56 Fed. Reg. 21,771 (1991) (to be codified at 40 C.F.R. §70.4(b)(9) (proposed May 10, 1991).

[25] 56 Fed. Reg. 21,771 (1991) (to be codified at 40 C.F.R. §70.4(b)(8) (proposed May 10, 1991).

[26] 40 C.F.R. §70.4(b)(12)(iii) (1994).

[27] 56 Fed. Reg. 21,772 (1991) (to be codified at 40 C.F.R. §70.4(c)) (proposed May 10, 1991).

[28] S*ee supra* part I, notes 43-46 and accompanying text.

[29] 40 C.F.R. §70.4(c)(3) (1994).

[30] S*ee supra* part I, notes 47-48, and accompanying text.

[31] 56 Fed. Reg. 21,772 (1991) (to be codified at 40 C.F.R. §70.4(d)) (proposed May 10, 1991).

[32] 40 C.F.R. §70.4(d)(3)(v)(1994). Affected States are all States:

(1) Whose air quality may be affected and that are contiguous to the State in which a part 70 permit, permit modification or permit renewal is being proposed; or

(2) That are within 50 miles of the permitted source.

40 C.F.R. §70.2 (1994)

EPA then set forth the procedures for program analysis by its staff and established the time periods for acting on a submitted program. Most importantly, EPA proposed that the one year period authorized for review of a state program under the statute would not begin until a program application was deemed complete, or if the program was materially changed during the review period, then EPA would have a year to review the program after the revisions were received.[33] A state could be granted up to two years for the revision of a program if the program were granted interim approval, partially approved, or disapproved, if the state demonstrated that it would need additional legal authority to make modifications that would comply with the requirements set forth in the statute and regulations.[34] These provisions remained substantially the same in the final regulation.[35]

C. Minimum Permit Application and Content Requirements

EPA proposed a that sources required to have a permit under 40 C.F.R. Part 70 would be required to apply for the permit no later than twelve months after a program is approved, unless required earlier by the permitting authority.[36] This requirement is virtually identical to the timetable required by Section 503 of the Clean Air Act.[37] A state would be allowed to prescribe its own forms, but would be required to collect information relating to plant ownership; location; description of plant processes and products; emissions information which would include emission points; emissions rates; fuels used; rates of consumption for fuels and raw materials; material information on air pollution control equipment; and, a description of work practices which would affect pollution from a source and information from all "applicable requirements" that could affect the source.[38] The application must

---

[33] 56 Fed. Reg. 21,772 (1991) (to be codified at 40 C.F.R. §70.4(e)) (proposed May 10, 1991).

[34] 56 Fed. Reg. 21,772-21,773 (1991) (to be codified at 40 C.F.R. §70.4(i)) (proposed May 10, 1991).

[35] 40 C.F.R. §§70.4(e)-70.4(k) (1994).

[36] 56 Fed. Reg. 21,773 (1991) (to be codified at 40 C.F.R. §70.5(a)) (proposed May 10, 1991).

[37] *See supra* part I, notes 50-51 and accompanying text.

[38] The proposal for the information required to satisfy the "applicable requirements" requirement was as follows:

contain information which sets forth the authority for the permit, a timetable for achieving compliance for non-compliant sources, and a requirement that the permit application and any information related to compliance of the permitted source be certified by a responsible official.[39] Finally the program has an obligation to make a completeness analysis of a permit application,[40] and an applicant has an obligation to supplement an application[41] if requested by a permitting authority or if the source becomes aware of the need to supplement the application on its own.

Provisions dealing with Operational Flexibility were moved from 40 C.F.R. Section 70.6 to 40 C.F.R. Section 70.4 in the final regulation. EPA did this because there was a great deal of controversy around the operational flexibility provisions. EPA identified three ways to provide operational flexibility.[42]

The revised 40 C.F.R. Section 70.5 was greatly expanded from the proposed version. New provisions cover timely applications and require permit revisions before commencing operation for previously prohibited activities. In addition, permitted sources were required to file permit renewal applications at least six months, but no longer than eighteen moths prior to expiration of the permit and deadlines were established for Phase II acid rain permits and Nitrogen Oxide sources.[43] The

---

(vii) Other information required by any applicable requirements (including information related to stack height limitations developed pursuant to section 123 of the Act), such as the location of emissions units, flow rates, building dimensions, and stack parameters (including height, diameter, and plume temperature) for all pollutants regulated at the part 70 source, except for VOC's.

56 Fed. Reg. 21,773 (1991) (to be codified at 40 C.F.R. §70.5(b)(vii) (proposed May 10, 1991).

[39] 56 Fed. Reg. 21,774 (1991) (to be codified at 40 C.F.R. §70.5(b)) (proposed May 10, 1991).

[40] 56 Fed. Reg. 21,774 (1991) (to be codified at 40 C.F.R. §70.5(c)) (proposed May 10, 1991).

[41] 56 Fed. Reg. 21,774 (1991) (to be codified at 40 C.F.R. §70.5(d)) (proposed May 10, 1991).

[42](i) Programs must allow certain narrowly defined changes within a permitted facility that contravene specific terms without requiring a permit revisions, as long as the source does not exceed the emissions allowable under the permit.

(ii)The permit program may allow emissions trading at the facility to meet SIP limits where the SIP provides for such trading on 7-days notice in cases where trading is not already provided for in the permit; and

(iii)The permit program must provide for emissions trading for purposes of complying with a federally-enforceable emissions cap established in the permit independent of or more strict that otherwise applicable requirements.

57 Fed. Reg. 32,266-32,267 (1992).

[43] 40 C.F.R. §70.5(a)(1) (1994).

determination of "completeness" was substantially unchanged, but permitting authorities were given an extended period of up to sixty days to determine if an application was to be considered complete through the absence of an affirmative action by the permitting authority.[44] Applicants would also be required to explain any proposed exemptions from permitting requirements,[45] and requirements were added mandating the use of nationally standardized forms for dealing with acid rain permits.[46] The certification requirement was strengthened and applies to all documentation required to filed under the Clean Air Act permit program.[47] Finally, all sources, regardless of compliance status, are required to supply compliance plans.[48]

The proposed 40 C.F.R. Section 70.6 established the minimum requirements for permit content. These standards include a requirement that the permit be no longer than five years in length; sets forth all applicable monitoring and reporting requirements; maintain all monitoring records for at least five years after they are taken; and, report all deviations from the permit requirement and this must be done promptly. In addition, the permit is not a conveyable property right and the permittee must supply information on request to the permitting authority.[49] The permit must set forth compliance requirements for monitoring and analysis; compliance certification; and, most importantly authorizes entry for inspectors or designated personnel.[50] The permit must allow the source to change operations without getting a permit revision, unless there is a contrary provision in the law, or the source wishes to

---

[44] 40 C.F.R. §70.5(a)(2) (1994).

[45] 40 C.F.R. §70.5(c)(6) (1994).

[46] 40 C.F.R. §70.5(c)(10) (1994).

[47] The certification requirement provides as follows:

(d) Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

40 C.F.R. §70.5(d) (1994).

[48] 40 C.F.R. §70.5(c)(8) (1994).

[49] 56 Fed. Reg. 21,774-21,775 (1991) (to be codified at 40 C.F.R. §70.6) (proposed May 10, 1991).

[50] 56 Fed. Reg. 21,776 (1991) (to be codified at 40 C.F.R. §70.6(c)) (proposed May 10, 1991).

increase its emissions.[51] The final regulation is substantially the same with respect to these permit content provisions, however, a section was added which correlates implementation plans to authorized emissions.[52]

The final aspect of permit content that was prescribed in the proposed regulation dealt with the "permit shield." The effectiveness of the permit shield would be based on compliance with requirements set forth in the permit itself. Effectively, a permit shield eliminates the threat of legal problems from either governmental entities or citizens if the permit was complied with during operation times and a violation occurred. The final regulation essentially maintained the same provisions, although some technical adjustments were made.[53]

With the final regulation, EPA added a new 40 C.F.R. Section 70.6(g) which provides for an "emergency defense."[54] There was no explicit provision for such an affirmative defense in the original proposal. After analyzing existing case law with respect to defenses that are available to sources in the context of the Clean Water Act, EPA felt that such a provision was necessary.[55]

---

[51] 56 Fed. Reg. 21,776 (1991) (to be codified at 40 C.F.R. §70.6(d)) (proposed May 10, 1991).

[52] 40 C.F.R. §70.6(a)(iii) (1994).

[53] 40 C.F.R. §70.6(f) (1994).

[54] 40 C.F.R. §70.6(g) (1994).

[55] Courts have held, in the Clean Water Act context, that a NPDES permit must contain upset provisions to account for the inherent fallibility of technology in technology based standards. See, e.g., Marathon Oil Co. v. EPA, 565 F.2d 1253, 1273 (9th Cir., 1977). Other cases have upheld EPA's decision not to promulgate upset provisions, reasoning that the exercise of enforcement discretion is adequate protection of the permittee's interests. Corn Refiner's Ass'n. Inc. v. Costle, 594 F.2d 1223, 1226 (8th Cir., 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1056-1058 (D.C. Cir. 1978). The idea that technology-based standards should account for the fallibility of technology has been affirmed in the context of New Source Performance Standards under the Act. See, e.g., Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973).

57 Fed. Reg. 32,279 (1992).

D. Actions by Permitting Authorities with Respect to Permits

A permit may only be issued by a permit authority after receipt of a complete permit application, with the exception of a general permit, for which no such requirement exists.[56] A source which does not have a permit, may continue to operate if it has a complete application filed with the appropriate authority and that authority has taken no action on the permit. Originally, only administrative permit changes were authorized without going through the elaborate review process set forth for obtaining a permit.[57] With the final regulation, administrative permit changes covers such things as changes in ownership, correction of typographical errors, and allows for the incorporation of preconstruction permit requirements into the permit.[58]

EPA called for permit modifications, to be allowed, but any permit modification would require that the permit holder go through the elaborate procedures initially required for obtaining a permit. These procedures include public notice, notification to adjoining states and authorization for an EPA veto if appropriate.[59] The new Permit Modification section[60] was greatly expanded, primarily by allowing the permitted source to obtain a minor permit modification. The minor permit modification procedures, in theory, are limited to changes that do not involve significant reporting or monitoring changes; changes that are unique to the permitted source; and, which do not allow a source to add an applicable requirement it had previously sought to avoid.[61] This procedure allows for an affected state

---

[56] 56 Fed. Reg. 21,776-21,778 (1991) (to be codified at 40 C.F.R. §70.7) (proposed May 10, 1991).

[57] 56 Fed. Reg. 21,777 (1991) (to be codified at 40 C.F.R. §70.7(e)) (proposed May 10, 1991).

[58] 40 C.F.R. §70.7(d) (1994).

[59] 56 Fed. Reg. 21,777 (1991) (to be codified at 40 C.F.R. §70.7(d)) (proposed May 10, 1991).

[60] 40 C.F.R. §70.7(e) (1994).

[61] *Id.* The modification procedures are as follows:

(2) Minor permit modification procedures (i) Criteria

(A) Minor permit modification procedures may be used only for those permit modifications that:

(1) Do not violate any applicable requirement;

(2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

and EPA to be notified of the permit modification,[62] and then authorizes issuance of the permit modification after EPA has had forty-five days to review the proposed modification.[63] There is an important disincentive to industry to use this procedure, because the permit shield does not extend to any modifications issued using this procedure.[64] A similar procedure is set up for group processing of minor permit modifications.[65] Public participation procedures do not apply to permits modified by these minor permit modification procedures.[66]

This change in the permit modification rules was clearly a concession to industry by EPA.:

> In reviewing comments from industry, it is clear to EPA that industry's primary concern is that quickly changing business conditions require changes in operation on little or no notice. This could not be accommodated by a process of indeterminate length that could delay any decision on even the most routine or noncontroversial changes, despite the permittee's good faith efforts to pursue the revision process. Industry comments do not dispute the fundamental obligation that any permit revision must comply with the applicable requirements, but maintain that the process should not unreasonably delay a decision to allow a facility to comply with the Act under revised permit terms. The minor permit modification procedures are designed to address these concerns within the framework of title V.[67]

---

(3) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and

(B) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

(5) Are not modifications under any provision of title I of the Act; and

(6) Are not required by the State program to be processed as a significant modification.

40 C.F.R. 70.7(e)(2)(i)(A)(1-6) (1994).

[62] 40 C.F.R. §70.7(e)(2)(iii) (1994).

[63] 40 C.F.R. §70.7(e)(2)(iv) (1994).

[64] 40 C.F.R. §70.7(e)(2)(vi) (1994).

[65] 40 C.F.R. §70.7(e)(3) (1994).

[66] 40 C.F.R. §70.7(h) (1994).

[67] 57 Fed. Reg. 32,281 (1992).

EPA felt that the statute was ambiguous on the point of whether public notice was required for every permit modification. Under the regulation, this provision of permit modification is mandatory on the states, and EPA cited the provisions of Clean Air Act Section 502(b)(6) as authority for this procedure.[68] EPA broke this statute down into four elements for the creation of a permitting program:

> (1) "For expeditiously determining when *applications* are complete,"
> (2) "For processing such *applications*,"
> (3) "For public notice, including offering an opportunity for public comment and a hearing, and"
> (4) "For expeditious review, of *permit actions, including applications, renewals, or revisions,* and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law."[69]

EPA clearly articulated that the public notice and comment provisions required for permits would not apply to the modifications authorized by this provision of the regulation. In analyzing the entire statute, EPA observed that "if Congress meant to require a comment period for all permit revisions, Congress would have directly so stated."[70]

E. Permit review by EPA and Affected States

EPA proposed 40 C.F.R. Section 70.8[71] to implement the provisions of Section 505 of the Clean Air Act.[72] The regulation paralleled the statute. The regulation as proposed authorized the administrator to waive requirements in this area on a source category basis, either through a general

---

[68] CAA §502(b)(6), 42 U.S.C.A. §7661a(b)(6) (1983-1995) provides:

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

[69] CAA §502(b)(6), 42 U.S.C.A. §7661a(b)(6) (1983-1995) *cited in* 57 Fed. Reg. 32,281(1992) with emphasis added by EPA.

[70] 57 Fed. Reg. 32,282 (1992).

[71] 56 Fed. Reg. 21,778-21,779 (1991) (to be codified at 40 C.F.R. §70.8) (proposed May 10, 1991).

[72] *See supra* part I, notes 68-78 and accompanying text.

rule-making or through notice at the time a state program was approved for operation.[73] Also listed were the grounds for objection to the issuance of a permit by EPA. These grounds included failure to comply the statute and applicable requirements as set forth in the regulations and statute. A permit could be objected to if the permitting authority was derelict in its duties with respect to information required to be supplied to EPA by the permitting authority.[74] In the final regulation, EPA added a requirement that evidence of compliance with the provisions set forth in 40 C.F.R. Section 70.7(h), which deal with "affected states" and "public participation,"[75] be supplied before a program is approved.

F. Fee Determination, Oversight, Sanctions and Enforcement Requirements

EPA proposed rules to amplify the statutory requirements concerning fee generation that would apply fee generation requirements in a manner as required by the statute.[76] The limitations placed on the collection of the fee by the regulation where that the maximum amount that could be collected would be $100,000, based on a limitation of twenty-five dollars per ton per year of pollutant generated with a maximum ton per year limitation of 4,000 tons per year. This fee would increase with the consumer price index on an annual basis.[77] The fee collected from all sources would have to cover the requirements set forth in the "program support test" established by EPA.[78] This fee structure was not

---

[73] 56 Fed. Reg. 21,779 (1991) (to be codified at 40 C.F.R. §70.8(a)) (proposed May 10, 1991).

[74] 56 Fed. Reg. 21,779 (1991) (to be codified at 40 C.F.R. §70.8(c)) (proposed May 10, 1991).

[75] 40 C.F.R. §70.8(c)(3)(iii) (1994).

[76] *See supra,* part I, notes 21-24 and accompanying text.

[77] 56 Fed. Reg. 21,779-21,780 (1991) (to be codified at 40 C.F.R. §70.9) (proposed May 10, 1991).

[78] 56 Fed. Reg. 21,779 (1991) (to be codified at 40 C.F.R. §70.9(b)(1)(i-vii)) (proposed May 10, 1991). The costs of the program which EPA expected to be supported by the fees generated were set forth as follows:

(1) Program support test. The fee program shall result in the collection and retention of revenues sufficient to support the reasonable direct and indirect costs of developing and implementing the permitting program (considering any associated overhead charges for personnel, equipment, buildings, and vehicles), including but not limited to the following activities:

the only one that EPA would consider. The proposed regulation required that the permitting authority collect fees sufficient to meet the program support requirements.[79]

Section 502 of the Clean Air Act mandates that a state be subject to sanctions for failure to enact an adequate permit program, or enforce an adequate program that has been approved,[80] and EPA proposed a rule to implement this section.[81] The regulation tracks the statutory section without much amplification. When the final regulation was published, a change enables the Administrator to impose a Federal program only in those areas of a state which had no legally enforceable state program.[82]

One of the most important regulatory sections was created to amplify and expand the enforcement tools available to the states for enforcement of the permit programs.[83] This authority was based on similar requirements found in the regulations that implement the Clean Water Act.[84] The minimum requirements set forth in the statute for state enforcement authority are that: "the permitting authority [shall] have adequate authority to...**(E)** enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties."[85]

(i) Reviewing and acting on any application for a permit or permit revision.
(ii) Implementing and enforcing the terms of any part 70 permit, (not including any court costs or other costs associated with any formal enforcement action).
(iii) Emissions and ambient monitoring, including adequate resources to audit and inspect source-operated monitoring programs.
(iv) Preparing generally applicable regulations, or guidance.
(v) Modeling, analyses, or demonstrations.
(vi) Preparing inventories and tracking emissions.
(vii) Providing support to part 70 sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act..

[79] 56 Fed. Reg. 21,780 (1991) (to be codified at 40 C.F.R. §70.9(b)(2)(v)) (proposed May 10, 1991).

[80] CAA §502(d)(2), 42 U.S.C.A. §7661a(d)(2) (1983-1995). *See* discussion accompanying Part I, Notes 37-40, *supra.*

[81] 56 Fed. Reg. 21,780-21,781 (1991) (to be codified at 40 C.F.R. §70.10) (proposed May 10, 1991).

[82] 40 C.F.R. §70.10(a)(2) (1994).

[83] 56 Fed. Reg. 21,781 (1991) (to be codified at 40 C.F.R. §70.11) (proposed May 10, 1991).

[84] *Id.*

[85] CAA §502(b)(5)(E), 42 U.S.C.A. §7661a(b)(5)(E) (1983-1995).

40 C.F.R. Section 70.11 required that the permitting authority be able to sue to stop violations, have authority to obtain equitable relief, including injunctions to enforce emergency powers, and set minimum requirements for criminal fines, which were not set forth in the statute. In addition, all criminal and civil penalties would be assessable for each day of violation, thus rendering each day that a violation occurred a separate violation.[86] Criminal fines would have to be set for a maximum fine of not less than $10,000 per day.[87] These requirements were unchanged when the regulation was implemented. In its commentary on this section EPA encouraged states to make the maximum use of administrative enforcement authority because undue delays would result if the judicial systems were used to enforce these rules.[88]

G. Hazardous Air Pollutants and State Permitting Programs

On April 1, 1994, EPA issued the proposed regulations[89] designed to implement Section 112(g) of the Clean Air Act well after the deadline established in the statute, which was no later than eighteen months after November 15, 1990.[90] The proposed rule would have implemented the requirements set forth by the statute to determine "de minimis" levels and allow for the execution of trade-offs under the state programs. This proposal attempted to meet "[o]ne of the most important and challenging

---

[86] 56 Fed. Reg. 21,781(1991).

[87] 56 Fed. Reg. 21,781 (1991) (to be codified at 40 C.F.R. §70.11(a)(3)(ii-iii)) (proposed May 10, 1991) required the following with respect to criminal penalties:

(ii) Criminal fines shall be recoverable against any person who knowingly violates any applicable standards or limitations; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than $10,000 a day for each violation.
(iii) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the permitting authority. These fines shall be recoverable in a maximum amount of not less than $10,000 for each instance of violation.

[88] 57 Fed. Reg. 32,293 (1992).

[89] 59 Fed. Reg. 15,504 (1994).

[90] CAA §112(g)(1)(B), 42 U.S.C.A. §7412(g)(1)(B) (1983-1995).

provisions of section 112(g),"[91] which was the ranking of the regulated pollutants for purposes of establishing offset demonstrations. EPA proposed this regulation with the intention that the disruption to the state programs would be minimized. Under the proposed regulations, states were given several options of submitting programs which implement Section 112 requirements. These options included having standards that were more stringent than the Federal Standards or would be identical to the Federal Standards.[92] EPA also indicated that it was possible that some states could implement programs that would not allow for the inclusion of "offsets" in the particular state program.[93]

This proposed rule went no where. EPA issued a clarification[94] to its position that the permitting of Hazardous Air Pollutants would take effect with the implementation of the state permitting program. EPA concluded that "section 112(g) [would] not take effect before the EPA issues notice and comment guidance addressing implementation of that section."[95] EPA had previously held that Section 112(g) would be implemented, regardless of the outcome, through the issuance of informal guidance to the EPA regions.[96] EPA concluded that it would be impossible for the states, or the regulated community, to comply with the complicated standards required under Section 112(g) without a standard regulation.[97]

Relying on Natural Resources Defense Council v. Environmental Protection Agency,[98] EPA declared that Section 112(g) would not be effective without the promulgated regulations required by Congress. This case involved similar deadlines imposed in relation to State Implementation Plans

---

[91] *Id.*

[92] 59 Fed. Reg. 15,564 (1994).

[93] *Id.*

[94] 60 Fed. Reg. 8333 (1995).

[95] *Id.*

[96] 60 Fed. Reg. 8333, Footnote 1, (1995).

[97] 60 Fed. Reg. 8333-8334 (1995).

[98] 22 F.3d 1125 (D.C. Circuit, 1994), (hereafter *NRDC v. EPA*).

under which states were required to submit plans related to basic and enhanced inspection and maintenance plans under Section 182 of the Clean Air Act.[99] EPA had a deadline of November 15, 1991 to publish regulations but did not approve such guidance until November 5, 1992.[100] The court extended the deadline for state action in this case and held that "[j]udicial extension ...is an extraordinary remedy not to be imposed as a matter of course. There are nonetheless circumstances in which an extension is warranted. Such is the case, ...if Congress would have intended that the deadline be extended to provide a party the full statutory time for acting on agency guidance."[101]

Under the circumstances that exist here, EPA believes the state programs it had approved by the time of the issuance of this "clarification" had generally met the standards required by the statute. These programs had generally committed to "implement section 112(g), in accordance with the EPA regulations and/or guidance, upon approval of their Title V program."[102] EPA concluded that this matter would just be held in limbo pending the final issuance of the regulations.

H. Other Proposed and Implemented Regulations which affect the State Permitting Programs

While the states have had to generate acceptable programs with less time than Congress intended when passing the Clean Air Act Amendments, regulations have not been limited to exclusively dealing with the state permit programs. EPA also proposed regulations dealing with the acid rain program,[103] parts of which became final in January, 1993.[104] Throughout the state program approval process EPA has proposed several rules which are of direct import on the permit program. These

---

[99] CAA §182, 42 U.S.C.A. §7511a (1983-1995)

[100] NRDC v. EPA, 22 F.3d 1125, 1132 (D.C. Circ., 1994).

[101] *Id.* at 1135.

[102] 60 Fed. Reg. 8335 (1995).

[103] Acid Rain Program: Permits, Allowance System, Continuous Emissions Monitoring, and Excess Emissions, 56 Fed. Reg. 63,002 (1991) (to be codified at 40 C.F.R. pts 72,73,75 and 77) (proposed Dec. 5, 1991).

include the ever growing list of Hazardous Air Pollutant standards. Published under the provisions of 40 C.F.R. Part 63, which will cause the states to have to regulate more pollution sources. EPA has proposed standards for the industries of shipbuilding and ship repair,[105] wood furniture manufacturing operations,[106] Gasoline Distribution,[107] and, magnetic tape manufacturing operations,[108] among others. Each state program will have to account for these changes and any proposed changes to Part 70.[109]

---

[104] 40 C.F.R. Pts 72,73, 75, 77, and 78 (1994).

[105] 59 Fed. Reg. 62,681 (1994).

[106] 59 Fed. Reg. 62,652 (1994).

[107] 59 Fed. Reg. 64,303 (1994).

[108] 59 Fed. Reg. 64,580 (1994).

[109] 59 Fed. Reg. 44,460 (1994).

III

State and Local Permitting Programs that are Approved or Proposed for Full Approval

A. Mississippi

Mississippi was the first state permitting program approved by EPA for full implementation. The authority for Mississippi's program is both statutory and regulatory and the statutory changes to Mississippi's statutes occurred in April, 1993. Mississippi's statutory authority for the existence of a state permit program has been in existence for some time. It requires that anyone who wants to pollute the air or desires to build, modify or expand an air pollution source must have a permit from the state.[1] Mississippi's statutory scheme also called for public participation in the permitting process by allowing public hearings on permits,[2] and allowing an "aggrieved party" to appeal a permit that is issued within twenty days of the permitting board's action on the permit.[3] With these statutes in place, it was a relatively simple matter for the state to issue regulations that would comply with the Clean Air Act permitting program.

EPA first proposed approval of the Mississippi program on October 3, 1994.[4] In order to obtain approval of the program, Mississippi was required to pass new legislation and use existing statutes to comply with the Federal requirements for the implementation of a program. The new 1993 statute created a trust fund for fees collected in pursuance of the state air pollution program; established deadlines for the submission of applications; provided for criminal penalties and the

---

[1] MISS. CODE ANN. §49-17-29(1) (1972-1995).

[2] MISS. CODE ANN. §49-17-29(4) (1972-1995).

[3] MISS. CODE ANN. §49-17-29(5) (1972-1995).

[4] 59 Fed. Reg. 50,214 (1994).

issuance of regulations to implement the program; and, created a program to assist small businesses in complying with the Clean Air Act.[5]

In order to insure that the funding requirements of the Clean Air Act are complied with, the Mississippi statute created a trust fund which was to fund the costs of the Clean Air Act Permit program. The moneys are to be recycled if the fund runs a surplus.[6] The primary regulatory vehicle used by Mississippi was the promulgation of a new regulation APS-S-6, entitled the "Mississippi Air Emissions Operating Permit Regulations for the purposes of Subchapter V of the Clean Air Act."[7] EPA reviewed the regulation submitted by the state and found that it complied with the statutory requirement set forth in the Clean Air Act.[8]

EPA noted that an approvable permit program "requires prompt reporting of deviations from permit requirements,"[9] Mississippi did not include such a definition in its regulations. Mississippi elected to meet this requirement by setting forth the requirements for prompt reporting in each individual permit and EPA noted that it would object to permits that did not adequately meet the definition of "prompt" for the particular permit. Mississippi also included provisions that would allow it to adapt its regulatory scheme to be consistent with the changes in Hazardous Air Pollutant

---

[5] 1993 Miss. Laws 611.

[6] MISS. CODE ANN. §49-17-14 (1972-1995).

[7] *See generally* Miss. Regulation APC-S-6 (1995) *cited in* 59 Fed. Reg. 50,214 (1994).

[8] EPA found that the submittal met the requirements of both 40 C.F.R. Part 70 and the statute and made the following comparison:

(A) Applicability requirements, (40 CFR 70.3(a)): APC-S-6, Section I.B; (B) Permit applications, (40 CFR 70.5): APC-S-6, Section II; (C) Provisions for permit content, (40 CFR 70.6): standard permit requirements: APC-S-6, Section III.A.1; permit duration: APC-S-6, Section III.A.2; monitoring and related record keeping and reporting requirements: APC-S-6, Section III.A.3; compliance requirements: APC-S-6, Sections III.B and III.C; (D) Operational flexibility provisions, (40 CFR 70.4(b)(12)): APC-S-6, Section IV.F; (E) Provisions for permit issuance, renewals, reopenings and revisions, including public participation (40 CFR 70.7): APC-S-6, Section IV; and (F) Permit review by EPA and affected States (40 CFR 70.6): APC-S-6, Section V. Mississippi Code Annotated (MSCA) sections 49-17-36 and 49-17-43, satisfy the requirements of 40 CFR 70.11, for enforcement authority.

59 Fed. Reg. 50,214-50,215 (1994).

[9] 59 Fed. Reg. 50,215 (1994).

Regulations.[10] Mississippi elected to use the pre-construction approval program that it had in place to satisfy the requirement for satisfying the requirements of Section 112(g) of the Clean Air Act. EPA still had not promulgated regulations to implement this section of the statute and Mississippi would be required to modify its regulations accordingly when the Federal regulations were finally promulgated.[11] With respect to the implementation of Section 112, EPA noted that Mississippi already had broad legal authority to implement any regulations implementing that statute. Furthermore, the state committed to "take action, following promulgation by EPA of regulations implementing section 112 of title III of the Federal Clean Air Act, and to submit, for EPA approval, MDEQ regulations implementing these provisions."[12]

The most important controversy generated by this program was in the area of "Title I modification." EPA approved Mississippi's program notwithstanding the problems that were still pending with the "Title I Modification."[13] EPA has proposed a modification that would clarify the meaning of the term "Title I Modification."[14] Mississippi defined a Title I modification as "any modification under Sections 111 or 112 of the Act and any physical change or change in methods of operation that is subject to preconstruction regulations promulgated under Part C and/or D of Title I of the Federal Act."[15] EPA concluded that this definition met the requirements of the Federal regulation, but added that it was EPA's interpretation that: "'modifications under any provision of [T]itle I of the Act' in 40 CFR 70.7(e)(2)(i)(A)(5) to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under [T]itle I of the Act."[16]

---

[10] 59 Fed. Reg. 50,215-50,216 (1994) citing Mississippi Air Pollution Control Regulation APC-S-1, §8. (1994).

[11] 59 Fed. Reg. 50,215-50,216 (1994).

[12] 59 Fed. Reg. 50,215 (1994).

[13] 59 Fed. Reg. 66,738 (1994).

[14] 59 Fed. Reg. 44,527 (1994).

[15] Mississippi Regulation APC-S-6, Section I-A, ¶31 (1995).

[16] 59 Fed. Reg. 50,216 (1994).

EPA reacted to comments that this definition would create problems by noting that its definition of a Title I modification was still under active reconsideration and noted that: "[u]pon EPA's final decision of what constitutes a 'title I modification,' the State has committed to revise its definition of what constitutes a 'title I modification.'"[17] EPA concluded that it would be inappropriate to hold Mississippi's program hostage to the vagaries of a proposed change to the Federal Regulation.[18] Effective January 25, 1995, Mississippi's program took effect, except for Indian Reservations located in that state.[19]

B. South Carolina

Like Mississippi, South Carolina had authority to require permits in its statutes prior to the enactment of the 1990 Clean Air Act Amendments. This statute prohibited the discharge of air pollution without a permit.[20] South Carolina submitted to EPA its duly enacted implementing regulation for the Part 70 Program on November 15, 1993.[21]

The state regulatory program that implements Subchapter V is entitled the "Title V Operating Permits Program."[22] EPA observed that the state regulation closely tracked the Federal Regulation when making a determination as to whether the proposed state regulation would be acceptable for ratification of the state program and delegation of Federal permit authority.[23] As with Mississippi, South Carolina's definition of a "Title I Modification"[24] was the cause of some comment on the part of

---

[17] 59 Fed. Reg. 66,738 (1994).

[18] 59 Fed. Reg. 66,738-66,739 (1994).

[19] 59 Fed. Reg. 66,737 (1994).

[20] S.C. CODE ANN. § 48-1-130 (Law. Co-op. 1976-1993)

[21] 60 Fed. Reg. 4585 (1995).

[22] *See generally* S.C. CODE REGS. § 61-62.70 (1995)

[23] 60 Fed. Reg. 4584 (1995).

[24] "Title I modification or modification under any provision of Title I of the Act" means any modification under §§ 111 or 112 of the Act and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Part C and D of the Act.

EPA. Specifically EPA noted that the definition did not "include changes which occur under the State's minor new source review regulations approved into the South Carolina State Implementation Plan."[25] Never-the-less, EPA concluded that this proposed definition should not be an obstacle to the full approval of the South Carolina permit program because EPA had not resolved the question of what a "Title I Modification" really constituted.[26]

An issue raised by EPA was the question of "prompt reporting" of deviations from an individual permit.[27] The state committed to placing this requirement in each individual permit as opposed to placing a requirement defining prompt reporting in each permit. EPA found this an acceptable alternative to having a programmatic definition, but threatened to veto permits that did not have an acceptable reporting time.[28] This proposed approval was issued prior to EPA's clarification of the status of Section 112 implementation in February 1995.[29] EPA proposed to use the preconstruction permit approval process as the mechanism for implementing Section 112 of the act. South Carolina wanted to accept delegation of section 112 standards on an automatic basis.[30]

While the deadline for comments expired on February 23, 1995,[31] EPA did not issue a final rulemaking on the South Carolina program until June 26, 1995 which granted full approval to the

---

S.C. CODE REGS. § 61-62.70.2 (hh) Copyright 1995 The Bureau of National Affairs, Inc.(1995)

[25] 60 Fed. Reg. 4584 (1995).

[26] *Id.*

[27] The requirement for prompt reporting is as follows:

Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

40 C.F.R. 70.6 (a)(3)(iii)(B) (1994) *cited in* 60 Fed. Reg. 4584 (1995).

[28] 60 Fed. Reg. 4584-4585 (1995).

[29] 59 Fed. Reg. 15,504 (1994).

[30] 60 Fed. Reg. 4585-4586 (1995).

[31] 60 Fed. Reg. 4586 (1995).

South Carolina program effective July 26, 1995.[32] EPA noted that South Carolina had committed to require oral notification of a deviation to the state within twenty-four hours of the deviation and written confirmation to the state within thirty days of the event.[33]

C. Utah

EPA first proposed approval of Utah's Subchapter V Permit program on March 22, 1995.[34] The statutory authority for the issuance of permits in Utah[35] was created for the purpose of complying with the 1990 Clean Air Act. Additionally, new statutory provisions were added to the Utah code to comply with Federal requirements for criminal and civil penalties for noncompliance.[36] The governor of Utah submitted the program to EPA on April 14, 1994, and additional documentation was submitted at EPA's request on August 25, 1994.[37] The geographical area of the proposed program was the entire state of Utah except for areas designated as Indian Country and subject to tribal jurisdiction.[38] Like the other states before it, Utah placed the rules to comply with the regulations found in Part 70 and Subchapter V of the Clean Air Act in a consolidated rule.[39]

---

[32] 60 Fed. Reg. 32,913 (1995).

[33] 60 Fed. Reg. 32,914 (1995).

[34] 60 Fed. Reg. 15,105 (1995).

[35] UTAH CODE ANN. §§19-2-109.1 to 109.3 (1953-1995).

[36] UTAH CODE ANN. §19-2-115 (1953-1995).

[37] 60 Fed. Reg., 15,105 (1995).

[38] In Utah's part 70 program submission, the State indicated that it is not seeking approval from EPA to administer the State's part 70 program within the exterior boundaries of Indian Reservations in Utah. In this notice, EPA proposes to approve Utah's part 70 program for all areas within the State except the following: lands within the exterior boundaries of Indian Reservations (including the Uintah and Ouray, Skull Valley, Paiute, Navajo, Goshute, White Mesa, and Northwestern Shoshoni Indian Reservations) and any other areas which are "Indian Country" within the meaning of 18 U.S.C. 1151 (excepted areas).

60 Fed. Reg. 15,109 (1995).

[39] UTAH ADMIN. R. 307-15 (1995).

Utah elected to place the requirements for prompt reporting of deviations from permit requirements in each individual permit.[40] EPA noted that it would analyze each permit to ensure that the reporting requirements were adequate for each permit. As a general rule, EPA observed that:

> prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under section 70.6(a)(3)(iii)(A) of the Federal operating permit regulation.[41]

EPA still found this approach acceptable, but as with other states, EPA decided to examine each permit to determine if the deviation reporting requirement set forth in the particular permit would meet its standards.[42]

Another cause of consternation to EPA was the fee structure in Utah. Under Utah law, a fee agency must submit its request for appropriations and any increases in fees to the state legislature for approval.[43] EPA noted that it could revoke Utah's approval if it found that funding became inadequate in time. The presumptive fee that is being charged by the state is $21.70 per ton of pollutant.[44] With respect to hazardous air pollutants, EPA found that the existing construction permit program in Utah would suffice to comply with the provisions of Section 112.[45]

---

[40] (B) Prompt reporting of deviations from permit requirements including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The Executive Secretary shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements. Deviations from permit requirements due to unavoidable breakdowns shall be reported according to the unavoidable breakdown provisions of R307-1-4.7. The Executive Secretary may establish more stringent reporting deadlines if required by the applicable requirement.

UTAH ADMIN. R. 307-15-6(1)(c)(iii)(A) (1995). (Copr. 1995, Bureau of National Affairs).

[41] 60 Fed. Reg. 15,106 (1995)

[42] *Id.*

[43] UTAH CODE ANN. §63-38-3.2 (1953-1995)

[44] 60 Fed. Reg. 15,107 (1995).

[45] UTAH ADMIN. R. 307-1-3.1 (1995) *cited in* 60 Fed. Reg. 15,108 (1995)

On June 8, 1995, EPA issued final approval for the Utah program.[46] Several comments were made regarding the Hazardous Air Pollutant program that had been approved by EPA and whether EPA was in fact going to be able to implement 112(g) pending the issuance of the regulation which would implement the statute. EPA noted that the approval of the Utah preconstruction permit program for this purpose was to have a viable program in place when and if an applicable Federal rule went into effect.[47] EPA also observed that the state had passed two new laws dealing with the establishment of an "environmental audit privilege,"[48] and concluded that these laws would be without effect with respect to the Subchapter V program. EPA concluded that with respect to the areas of "Indian Country" for which the state had not sought jurisdiction, the state could seek to apply its permit program without prejudice at a later date and approved the program to take effect on July 10, 1995.[49]

D. Louisiana

Louisiana is different from the other states previously discussed in that EPA originally proposed Louisiana's program for interim approval[50] and then subsequently reproposed the program for full approval.[51] The agency responsible for enforcing environmental laws in Louisiana is the

---

[46] 60 Fed. Reg. 30,193 (1995).

[47] Utah must be able to implement section 112(g) during the period between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations. EPA believes that, if necessary, Utah can utilize its construction review program to serve as a procedural vehicle for implementing Section 112(g) and making these requirements federally enforceable between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations. EPA's approval of Utah's construction review program may be used solely for the purpose of implementing section 112(g) during the transition period to meet the requirements of section 112(g). EPA is limiting the duration of the approval to 12 months following promulgation by EPA of its section 112(g) rule and this approval will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted.

60 Fed. Reg. 30,194 (1995).

[48] UTAH CODE ANN. §§19-7-101 to 19-7-108 (1953-1995) *and* UTAH R. EVID. R. 508 (1995) *cited in* 60 Fed. Reg. 30,194-30,195 (1995).

[49] 60 Fed. Reg. 30,195 (1995) (to be codified at 40 C.F.R. Part 70, App. A).

[50] 59 Fed. Reg. 43,797 (1994).

[51] 60 Fed. Reg. 17,750 (1995).

Louisiana Department of Environmental Quality. The statutory authority for a permit program in Louisiana predates the enactment of the 1990 Clean Air Act Amendments.[52] As a consequence the changes required in the Louisiana permitting scheme were for the most part regulatory in nature.

Louisiana initially submitted a program to Region 6 of EPA on November 15, 1993.[53] EPA, in reviewing the submittal found that an ambiguity existed as to whether the contents of an air pollution permit could be subject to public disclosure as required by Subchapter V.[54] EPA analyzed the regulations that were adopted by Louisiana in support of the submittal in comparison with the requirements set forth in 40 C.F.R. Part 70.[55]

The grounds set forth by EPA for granting interim approval included an exclusion that Louisiana had placed in its regulations allowing certain Research and Development facilities within a regulated site to not have to obtain a permit, or be included in a general permit. The agency found that it was appropriate to grant source category limited interim approval for:

> programs do not provide for permitting all required sources if the State makes a showing that two criteria are met: (1) That there were "compelling reasons" for the

---

[52] The state has the following authority to issue permits:

(2)(a) To develop permitting procedures and regulations conforming to applicable state and federal laws, and to require and issue permits, licenses, variances, or compliance schedules for all sources of air contaminants within the state of Louisiana and when the secretary deems it advisable to delegate the power to issue such permits, licenses, variances, or compliance schedules to the assistant secretary subject to his continuing oversight or refer it to the commission.

LA. REV. STAT. ANN. §30:2054(B)(2)(a) (West 1989-1995).

[53] 59 Fed. Reg. 43,804 (1994).

[54] CAA §503(e), 42 U.S.C.A. §7661b(e) (1983-1995).

[55] The following requirements, set out in the EPA's part 70 regulation, are addressed in the State's submittal: (1) Provisions to determine applicability (40 CFR 70.3(a)): AQ# 70 section 507.A.1; (2) Provisions to determine complete applications (40 CFR 70.5(a)(2)) and program documentation (40 CFR 70.4(b)(4)): AQ# 70 section 519 and AQ# 70 section 517 respectively, and Volume III, Permit Forms and Instructions; (3) Public Participation (40 CFR 70.7(h)): AQ# 70 section 531.A; (4) Provisions for minor permit modifications (40 CFR 70.7(e)(2)): AQ# 70 section 525; (5) Provisions for permit content (40 CFR 70.6(a)); Volume III, Permit Forms and Instructions; (6) Provisions for operational flexibility (40 CFR 70.4(b)(12)): AQ# 70 section 507.G; (7) Provisions to determine insignificant activities (40 CFR 70.4(b)(2)): A list of insignificant activities was not included with the submittal and may be submitted as a revision at a later date; (8) Enforcement provisions (40 CFR 70.4(b)(5) and 70.4(b)(4)(ii)): 30 L.R.S. section 2025.F and Volume I, Enforcement and Compliance Programs.

59 Fed. Reg. 43,799 (1994).

> exclusions; and (2) that all required sources will be permitted on a schedule that "substantially meets" the requirements of 40 CFR part 70.[56]

EPA found that this exclusion was incompatible with the federal regulatory requirement that all Part 70 sources be regulated and permitted.[57] Evidently, Louisiana had interpreted the preamble to the final rulemaking as allowing the exclusion that Louisiana had proposed.

Louisiana established deadlines under the acid rain program that were inconsistent internally with the Federal acid rain regulations. This inconsistency was another cause for granting interim approval status to Louisiana's program.[58] EPA also found that the administrative permit provisions would allow for off permit changes that would be contrary to the Federal rule and therefor required a change in the Administrative permit procedures before the program would be deemed acceptable.[59] Louisiana's records law required that state records be retained for three years, and EPA required that there be a change in the statute, or some demonstration that the air pollution program's record retention requirement would meet the five year record retention requirement.[60] Louisiana established a fee schedule which assessed an average cost of $19 per ton for all part 70 sources, which EPA found acceptable, and Louisiana proposed to implement the statutory requirements of Section 112(g) through the preconstruction permitting process as other states had done.[61]

On November 16, 1994, Louisiana made an additional submittal to EPA to deal with the reservations expressed by EPA and obtain full approval. EPA found that the additional submittal adequately addressed its concerns and proposed full approval for all of Louisiana except for Indian

---

[56] 59 Fed. Reg. 43,800 (1994)

[57] 40 C.F.R. §70.4(b)(3)(i) (1994) *cited in* 59 Fed. Reg. 43,799 (1994).

[58] 59 Fed. Reg. 43,801 (1994).

[59] *Id.*

[60] LA. REV. STAT. ANN. §44:1, 36 (West 1989-1995) *cited in* 59 Fed. Reg. 43,802 (1994).

[61] 59 Fed. Reg. 43,803 (1994).

Lands on April 7, 1995.[62] Louisiana changed its confidentiality provisions to conform with EPA's desires so that no portion of a permit would be held confidential.[63] Another change made was to allow Research and Development (R&D) facilities to not be considered as part of a facility if the Research and Development facility had a separate SIC (Standard Industrial Classification Code) from the parent source. EPA stated that it could accept such an arrangement.[64] Louisiana eliminated the confusion that existed with respect to its deadlines for "Acid Rain permit applications."[65] Louisiana changed its regulations regarding administrative permits to indicate that some changes would be non-Federal in nature. EPA accepted this change.[66] Louisiana also changed its provisions respecting record retention, significant modification procedures and permit conditions to comply with EPA's grounds for granting full approval.[67]

With respect to the confusion over "Title I modifications" and provisions enforcing Section 112 of the Act, EPA accepted Louisiana's definition of a "Title I modification."[68] As with other states,

---

[62] 60 Fed. Reg. 17,750 (1995).

[63] Non-disclosure Must be Requested. All information obtained under the Louisiana Environmental Quality Act (the Act) R.S. 30:2001 et seq. or these regulations; by any order, license, or permit term or condition adopted or issued under the Act or these regulations; or by any investigation authorized thereby shall be available to the public, unless non-disclosure is requested and granted in accordance with R.S. 30:2030. Claims of confidentiality for any data regarding air emissions will be denied. No permit or portion of a permit issued to a source in accordance with LAC 33:III.507 shall be held confidential. L.A.C. 33:III.517.F.1 (1995) *cited in* 60 Fed. Reg. 17,751 (1995).

[64] Research and Development Facilities. The permitting authority may allow a research and development facility to be considered as a separate source with regard to the requirements of this Chapter, provided that the facility has a different two-digit Standard Industrial Classification (SIC) code from, and is not a support facility of, the source with which it is co-located. L.A.C. 33:III.501.B.7 (1995) *cited in* 60 Fed. Reg. 17,751 (1995).

[65] 60 Fed. Reg. 17,751-17,752 (1995).

[66] 521 Administrative Amendments

A. Administrative Amendment Criteria. Administrative amendment procedures may be used to revise the permit for any change that would not violate any applicable requirement or standard and:

…6. incorporates state-only changes to terms and conditions which are not federally enforceable under 40 CFR Part 70 and which the permitting authority determines to be similar in nature to the changes listed in this Subsection.

L.A.C. 33:III.521.A.6 (1995, Copr. Bureau of National Affairs, 1995) *cited in* 60 Fed. Reg. 17,752 (1995)

[67] 60 Fed. Reg. 17,752-17,753 (1995).

[68] Title I Modification--any physical change or change in the method of operation of a stationary source which increases the amount of any regulated air pollutant emitted or which results in the emission of any regulated air pollutant not previously emitted and which meets one or more of the following descriptions:

the problems dealing with EPA's lack of finality in this area created problems for the regulated community, however, EPA observed that the fact that Section 112's status was still undetermined and that it was unenforceable pending a final regulation rendered comments on this section moot.[69]. The status of this program is still pending.

E. Ohio

In order to comply with Subchapter V of the Clean Air Act, Ohio passed a new statute that created a special category of air pollution permits needed to operate a source regulated under Subchapter V.[70] The Ohio Department of Environmental Protection then subsequently promulgated regulations in accordance with that statute and the corresponding Federal statute and regulations.[71] The program was submitted to EPA on July 22, 1994, and supplemental submissions were made on September 12, November 21, and December 9, 1994, and January 5, 1995. In addition, EPA found that other statutory and regulatory portions of the Ohio program were needed for full consideration and approval of the proposed Ohio program.[72]

As with Louisiana, there was a potential issue with regard to Research and Development (R&D) facilities and whether or not the facilities would be required to be controlled as part of a source

---

a. the change will result in the applicability of a standard of performance for new stationary sources promulgated pursuant to section 111 of the Clean Air Act;
b. the change will result in a significant net emissions increase under the program for the Prevention of Significant Deterioration, as defined in L.A.C. 33:III.509;
c. the change will result in a significant net emissions increase under the program for Nonattainment New Source Review, as defined in L.A.C. 33:III.504;
d. the change will result in the applicability of a maximum achievable control technology (MACT) determination pursuant to regulations promulgated under section 112(g) (Modifications, Hazardous Air Pollutants) of the Clean Air Act.
L.A.C. 33:III.502 (1995, Copyright 1995 The Bureau of National Affairs, Inc.) *cited in* 60 Fed. Reg. 17,753 (1995)

[69] 60 Fed. Reg. 17,755 (1995).

[70] OHIO REV. CODE ANN. §3704.036 (Baldwin 1995)

[71] OHIO ADMIN. CODE §§3745-77-01 to -10 (1995).

[72] 60 Fed. Reg. 18,791 (1995).

subject to permitting under Subchapter V.[73] EPA did not regard this as a problem because all insignificant activities must be reported for purposes of determining whether a source is in compliance with all applicable requirements.[74] While EPA found no provisions specifically designed to implement Section 112(g) of the Clean Air Act, EPA construed Ohio's authority to implement all "requirements"[75] of the Clean Air Act. With respect to the implementation of Section 112(g) standards, EPA, authorized Ohio to use a Federally Enforceable State Operating Permits (FESOP) program for limiting hazardous air pollutants[76] as opposed to using the preconstruction program. EPA also decided to defer a decision on whether Ohio's definition of a "Title I modification"[77] would require further modification pending

---

[73] Ohio defined a Research and Development source as a source that:

(P) "Research and development sources" means sources whose activities are conducted for nonprofit scientific or educational purposes; sources whose activities are conducted to test more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided that the activities do not include the production of an intermediate or final product for sale or exchange for commercial profit, except in a de minimis manner; a research or laboratory source the primary purpose of which is to conduct research and development into new processes and products, that is operated under the close supervision of technically trained personnel, and that is not engaged in the manufacture of products for sale or exchange for commercial profit, except in a de minimis manner; the temporary use of normal production sources in a research and development mode to test the technical or commercial viability of alternative raw materials or production processes, provided that the use does not include the production of an intermediate or final product for sale or exchange for commercial profit, except in a de minimis manner; the experimental firing of any fuel or combination of fuels in a boiler, heater, furnace, or dryer for the purpose of conducting research and development of more efficient combustion or more effective prevention or control of air pollutant emissions, provided that, during those periods of research and development, the heat generated is not used for normal production purposes or for producing a product for sale or exchange for commercial profit, except in a de minimis manner; and such other similar sources as the director may prescribe by rule.

OHIO REV. CODE ANN. §3704.01(P) (Baldwin 1995).

[74] 60 Fed. Reg. 18,791 (1995).

[75] The director of environmental protection shall develop and administer a federally approvable Title V permit program and shall take all necessary and appropriate action to implement, through the issuance of Title V permits, applicable requirements of the federal Clean Air Act. Title V permits shall be required only for major sources and affected sources, as defined in 40 C.F.R. 70.2, and solid waste incineration units required to obtain a permit under section 129 (e) of the federal Clean Air Act unless the administrator extends the obligation to obtain a Title V permit to other sources.

OHIO REV. CODE ANN. §3704.036(A) (Baldwin 1995).

[76] Limiting HAP Emissions Through a FESOP Program. On October 25, 1994, EPA conditionally approved OAC 3745-35-07 for establishing a mechanism for creating federally enforceable limits on a sources potential to emit (59 FR 53586). This rulemaking, which became effective on December 27, 1994, authorizes the State to issue federally enforceable State operating permits addressing both criteria pollutants and HAPs.

60 Fed. Reg. 18,792 (1995).

[77] (JJ) "Title I modification" or "modification under any provision of Title I of the Act" means any modification under sections 111 or 112 of the Act and any major modification under Parts C or D of Title I of the Act.

OHIO ADMIN. CODE §3745-77-01(JJ) (1995).

the issuance of regulations on the subject.[78] EPA has not issued a final notice of proposed rule-making with respect to this program.

F. Nebraska

Nebraska was the first state to have a local program be proposed for full approval. On January 31, 1995, Region 7 of EPA proposed full approval for the Lincoln-Lancaster permitting program, which was submitted through the state of Nebraska by the Lincoln-Lancaster County Health Department.[79] The permitting program for the City of Omaha, Nebraska, and the program for the state of Nebraska were subsequently proposed for full approval by EPA.[80] In order to comply with Subchapter V, the Nebraska legislature enacted changes to its existing pollution control laws to add provisions for a permit program that would comply with Subchapter V.[81] Nebraska also added a section which complied with the fee collection provisions set forth in Subchapter V and the Federal regulations.[82]

Nebraska's statute provides for the regulation of hazardous air pollutants and acid rain sources required under the Clean Air Act.[83] When the proposal for approval of Lincoln-Lancaster was issued, EPA noted that changes would be necessary in the definitions of "applicable requirements" and "title I modifications" as originally set forth in the proposed local regulations.[84] EPA noted that changes were pending in corresponding state regulations that would remedy the defect in the "applicable

---

[78] 60 Fed. Reg. 18,793 (1995).

[79] 60 Fed. Reg. 5883 (1995).

[80] 60 Fed. Reg. 12,521 (1995).

[81] NEB. REV. STAT. §81-1505(12) (1994-1995).

[82] NEB. REV. STAT. §81-1505.04 (1994-1995).

[83] 60 Fed. Reg. 12,523-12,524. (1995).

[84] 60 Fed. Reg. 5886 (1995).

requirements" definition.[85] Evidently this problem, at least as perceived with respect to the state's definition of applicable requirement was corrected as EPA ultimately recommended approval of the state regulatory program.

EPA proposed delegation of authority under Section 112 to all the programs in Nebraska.[86] As with other programs, EPA relied on the preconstruction program to enforce the hazardous air pollution program in these areas.[87] EPA made no mention of the state's or Omaha's definition of a "Title I modification" in its notice recommending approval of the programs.[88] The final rulemaking on these programs is pending. On April 3, 1995, EPA proposed to grant approval[89] to Lincoln-Lancaster for implementation of section 112 standards after a request was made by Lincoln-Lancaster to implement the program in their area of jurisdiction. This action is still pending.

G. Kansas

On July 3, 1995, Region 7 proposed that full approval be given to the Kansas permitting program.[90] EPA gave general approval to the Kansas statutory[91] and regulatory[92] scheme enacted to comply with the federal permit program requirements. EPA indicated several changes to be made prior

---

[85] The origin of the LLCHD rule is in title 129 of the state rule. The state has proposed rule changes for adoption in December 1994 to correct this deficiency. As with all other rules adopted by the state, LLCHD will incorporate this change approximately two months afterward and therefore fulfill all minor permit modification requirements. This change, along with the modification of "applicable requirement," will be required before the EPA will grant approval for the program.

60 Fed. Reg. 5885 (1995).

[86] 60 Fed. Reg. 5886 (1995) (for Lincoln-Lancaster) *and* 60 Fed. Reg. 12,524 (1995) (for Omaha and the state program).

[87] *Id.*

[88] "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

NEB. ADMIN. R. & REGS. 129-1-056 (1995).

[89] 60 Fed. Reg. 16,829 (1995).

[90] 60 Fed. Reg. 34,494 (1995).

[91] *See generally* KAN. STAT. ANN. §§65-3001 to -3018 (1992-1995).

[92] *See generally* KAN. ADMIN. REGS. §§28-19-500 to -518 *cited in* 60 Fed. Reg. 34,494 (1995).

to full approval being granted, and if the suggested changes were not made, the program would be disapproved.[93]

The mandated changes included a change in the definition of an applicable requirement to include construction permit requirements and exclude the requirement that a "SIP or Federal Implementation Plan requirement must be part of the Kansas air quality regulations."[94] EPA required that the Kansas permit application regulation be revised to include fugitive emissions of regulated pollutants; remove listings of insignificant activities from the applications, and clarify that compliance plans apply to all regulated sources.[95] The Kansas regulation[96] dealing with alternative emissions limits did not comply with Federal requirements[97] that an implementation plan must expressly authorize alternative limits and that a source must furnish a seven day notice for a putative change in emissions limits in accordance with Part 70.[98] Finally, EPA noted that the Kansas regulations[99] did not contain a clause mandating the timely filing of a required permit application, but EPA noted that the state had committed to remedy this problem.[100]

Kansas fee is twenty dollars per ton of regulated pollutant, and as a consequence, the state submitted the required demonstration[101] that this fee would still adequately support the state permit

---

[93] 60 Fed. Reg. 34,494-34,495 (1995).

[94] 60 Fed. Reg. 34,494 (1995).

[95] KAN. ADMIN. REGS. §28-19-511 (1995) *cited in* 60 Fed. Reg. 34,494 (1995).

[96] KAN. ADMIN. REGS. §28-19-512 (1995) *cited in* 60 Fed. Reg. 34,495 (1995).

[97] 40 C.F.R. §70.6(a)(1)(iii) (1994) *cited in* 60 Fed. Reg. 34,495 (1995).

[98] 40 C.F.R. §70.4(b)(12)(iii) (1994) *cited in* 60 Fed. Reg. 34,495 (1995).

[99] KAN. ADMIN. REGS. §28-19-518 (1995) *cited in* 60 Fed. Reg. 34,495 (1995).

[100] 60 Fed. Reg. 34,495 (1995).

[101] *Id.*

program, even though the fee was below the presumptive minimum established by the Clean Air Act.[102] EPA noted that:

> The EPA is aware that Kansas lacks a program designed specifically to implement section 112(g). However, Kansas does have a program for review of new and modified hazardous air pollutant sources that can serve as an adequate implementation vehicle during the transition period, because it would allow Kansas to select control measures that would meet MACT, as defined in section 112, and incorporate these measures into a Federally enforceable preconstruction permit.[103]

Based on this, EPA proposed to delegate all authorities under Section 112 to Kansas, using the preconstruction program and existing Kansas regulations to implement Section 112 in Kansas.[104] Finally, EPA observed that the Kansas program also was adequate to implement the acid rain program, and if the changes that EPA required were made, and an Implementation Agreement with EPA was executed, the program would be eligible for full approval.[105] On July 17, 1995, EPA issued a direct final rule which implemented the Kansas implementation plan provisions dealing with a separate program controlling the potential to emit for some criteria pollutants and HAPs.[106] EPA granted approval specifically to the creation of a "Federally Enforceable State Operating Program (FESOP), which EPA believed would be adequate to enforce Section 112 notwithstanding the fact that the

---

[102] CAA §502(b)(3)(B)(i), 42 U.S.C.A. §7661a(b)(3)(B)(i) (1983-1995).

[103] 60 Fed. Reg. 34,496 (1995).

[104] *Id.*

[105] *Id.*

regulation on Section 112 has yet to be published.[107] The five criteria for approving a FESOP in the absence of a regulation on Section 112 were also announced in this rulemaking as well.[108] The permit program itself is pending a final rulemaking.

---

[106] 60 Fed. Reg. 36,361 (1995).

[107] 60 Fed. Reg. 36,363 (1995).

[108] [A] FESOP program for HAPs must meet the statutory criteria for approval under section 112(l)(5). This section allows EPA to approve a program only if it: (1) Contains adequate authority to ensure compliance with any section 112 standards or requirements; (2) provides for adequate resources; (3) provides for an expeditious schedule for ensuring compliance with section 112 requirements; and (4) is otherwise likely to satisfy the objectives of the Act.

60 Fed. Reg. 36,363 (1995).

IV

Programs with Interim Approval or that have been proposed for Interim Approval

When Subchapter V was passed by Congress, a status, known as "interim approval" was authorized for programs that did not fully meet the standards for approval, but could never-the-less become operational. This status was only authorized for a maximum of two years after the issuance of the interim approval by the Administrator.[1] EPA stated that it would grant interim approval to programs that substantially meets the requirements of this part, but are not fully approvable.[2] In order to meet the minimum criteria for interim approval, a program must provide for collection of adequate fees; satisfy the applicable requirements with respect to major sources; provide for fixed permit terms; allow for public participation; provide for EPA and affected state review; allow for the EPA to veto permits, if necessary; have adequate enforcement authority; provide for operational flexibility; have streamlined procedures for permit application and revision; submit copies of the permit application and other related documentation; and, provide for alternative operating scenarios.[3] With these guidelines in

---

[1] CAA §502(g), 42 U.S.C.A. §7661a(g) (1983-1995).

[2] 40 C.F.R. §70.3(d)(1) (1994).

[3] (3) The EPA will grant interim approval to any program if it meets each of the following minimum requirements:

(i) Adequate fees. The program must provide for collecting permit fees adequate for it to meet the requirements of §70.9 of this part.

(ii) Applicable requirements. The program must provide for adequate authority to issue permits that assure compliance with the requirements of paragraph (c)(1) of this section for those major sources covered by the program.

(iii) Fixed term. The program must provide for fixed permit terms, consistent with paragraphs (b)(3) (iii) and (iv) of this section.

(iv) Public participation. The program must provide for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions, except for modifications qualifying for minor permit modification procedures under §70.7(e) of this part.

(v) EPA and affected State review. The program must allow EPA an opportunity to review each proposed permit, including permit revisions, and to object to its issuance consistent with §70.8(c) of this part. The program must provide for affected State review consistent with §70.8(b) of this part.

effect, the majority of actions by EPA with respect to programs have been to give them interim approval status under this authority. In virtually every case, each program is given authority to remedy the problem within two years. The process that occurred in Louisiana[4] is illustrative of what those areas that have been granted interim approval will have to go though to obtain full approval of their programs. As a general rule, the simpler a program, and the more it tracks the Federal regulation, the more likely the program will be fully approved.

This part of the thesis will deal with all those state and local programs that have been granted or proposed for interim approval status by EPA except for programs in California, which will be covered in a separate part of this work.[5]

A. Washington State

The first program to be granted interim approval status was that of Washington state and eight local programs[6] in that state.[7] The statutory authority for the permit program in Washington was

---

(vi) Permit issuance. The program must provide that the proposed permit will not be issued if EPA objects to its issuance.

(vii) Enforcement. The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.

(viii) Operational flexibility. The program must allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the act and the changes do not exceed the emissions allowable under the permit, consistent with paragraph (b)(12) of this section.

(ix) Streamlined procedures. The program must provide for streamlined procedures for issuing and revising permits and determining expeditiously after receipt of a permit application or application for a permit revision whether such application is complete.

(x) Permit application. The program submittal must include copies of the permit application and reporting form(s) that the State will use in implementing the interim program.

(xi) Alternative scenarios. The program submittal must include provisions to insure that alternate scenarios requested by the source are included in the part 70 permit pursuant to §70.6(a)(9) of this part.

40 C.F.R. §70.3(d)(3) (1994).

[4] *See supra* part III.D.

[5] *See infra* Part V.

[6] EPA proposes interim approval of the operating permit programs submitted by the Washington Department of Ecology (Ecology), the Washington Energy Facility Site Evaluation Council (EFSEC), the Northwest Air Pollution Authority (NWAPA), the Olympic Air Pollution Control Authority (OAPCA), the Puget Sound Air Pollution Control Agency (PSAPCA), the Spokane County Air Pollution Control Authority (SCAPCA), and the Southwest Air Pollution Control Authority (SWAPCA) for the purpose of complying with Title V of the Federal Clean Air Act...

changed to comply with the provisions of Subchapter V.[8] The state Department of Ecology (hereafter "Ecology") promulgated a regulation to comply with Subchapter V[9] that was used as a model, or incorporated by reference by the local authorities when establishing the respective programs for the areas where the local programs had jurisdiction.[10] Two of the local programs, Benton-Franklin, and Yakima County adopted their regulations prior to the adoption of the state regulation and EPA concluded that these programs would face substantial problems in implementation because of the programs dubious legality.[11] EPA noted that the local jurisdictions would be able to regulate

> All Title V sources within the jurisdiction of a delegated local air authority will be subject to the operating permit program of such local air authority, except for primary aluminum smelters, kraft pulping mills, sulfite pulping mills, energy facilities under EFSEC's jurisdiction and sources on the U.S. Department of Energy's Hanford Nuclear Reservation. These sources, along with sources in the 17 counties not covered by local air authorities, will be subject to Ecology's operating permit program, with the exception of energy facilities that will be subject to EFSEC's program.[12]

EPA noted that the state had claimed jurisdiction over some Indian lands for the purpose of implementing Subchapter V, but found that this claim was debatable and proposed only to grant Washington such authority where there was an existing statutorily ratified agreement respecting the implementation of environmental laws by the state in Pierce County, Washington, on the Puyallup Indian Reservation.[13] All other Indian Reservations would be regulated directly by EPA under the

---

EPA proposes two alternative actions on the operating permit programs submitted by the Benton-Franklin Counties Clean Air Authority (BFCCAA) and the Yakima County Clean Air Authority (YCCAA): disapproval or, if these permitting authorities make certain specified changes to their operating permit programs by the time EPA takes final action on this proposed rulemaking, interim approval.

59 Fed. Reg. 42,553 (1994).

[7] 59 Fed. Reg. 55,813 (1994).

[8] WASH. REV. CODE ANN. §70.94.161 (West 1992-1995) *cited in* 59 Fed. Reg. 42,553 (1994)

[9] WASH. ADMIN. CODE §§173-401-100 to -940 (1995) *cited in* 59 Fed. Reg. 42,553 (1994)

[10] 59 Fed. Reg. 42,553-42,554 (1994).

[11] *Id.*

[12] 59 Fed. Reg. 42,553 (1994).

[13]The Tribe shall retain and exercise jurisdiction, and the United States and the State and political subdivisions thereof shall retain and exercise jurisdiction, as provided in the Settlement Agreement and Technical Documents and, where not provided therein, as otherwise provided by Federal law.

provisions of Subchapter V.[14] EPA found that the provisions relating to applicable requirements, while confusing were never-the-less acceptable and would not bar to approval of the program.[15] EPA found that if compliance schedules in preexisting orders would be submitted as part of a permit, and the compliance order made no provisions for penalties, then this would be contrary to Federal rules.[16]

EPA found that the Washington submittal generally met standards for full approval, but found deficiencies in the definition of a "Title I modification;"[17] inadequate criminal penalties[18] in the authorizing statute; and revision of the criminal penalty provisions to authorize punishment of

---

25 U.S.C.A. §1773g (1983-1995) *cited in* 59 Fed. Reg. 42,254.

[14] Title V sources located within the exterior boundaries of other Indian Reservations in Washington will be subject to the federal operating permit program, to be promulgated at 40 CFR Part 71, or subject to the operating permit program of any Tribe approved after issuance of the regulations under Section 301(d) of the Clean Air Act authorizing EPA to treat Tribes in the same manner as States for appropriate Clean Air Act provisions.

59 Fed. Reg. 42,554 (1994).

[15] *Id.*

[16] Compliance schedules

(1) Issuance. Whenever a source is found to be in violation of an emission standard or other provision of this chapter, ecology or the authority may issue a regulatory order requiring that the source be brought into compliance within a specified time. The order shall contain a schedule for installation, with intermediate benchmark dates and a final completion date, and shall constitute a compliance schedule. Requirements for public involvement (WAC 173-400-171) must be met.

(2) Federal action. A source shall be considered to be in compliance with this chapter if all the provisions of its individual compliance schedule included with a regulatory order are being met. Such compliance does not preclude federal enforcement action by the EPA until and unless the schedule is submitted and adopted as an amendment to the state implementation plan.

(3) Penalties for delayed compliance. Sources on a compliance schedule but not meeting emissions standards may be subject to penalties as provided in the Federal Clean Air Act

WASH. ADMIN. CODE §173-400-161(1-3) (1994) *cited in* 59 Fed. Reg. 42,554 (1994)

[17](33) "Title I modification" or "modification under any provision of Title I of the FCAA [Federal Clean Air Act]" means any modification under Sections 111 (Standards of Performance for New Stationary Sources) or 112 (Hazardous Air Pollutants) of the FCAA and any physical change or change in the method of operations that is subject to the preconstruction review regulations promulgated under Parts C (Prevention of Significant Deterioration) and D (Plan Requirements for Nonattainment Areas) of Title I of the FCAA.

WASH. ADMIN. CODE §173-401-200(33) (1994) *cited in* 59 Fed. Reg. 42,557 (1994)

[18] (1) Any person who knowingly violates any of the provisions of chapter 70.94 or 70.120 RCW, or any ordinance, resolution, or regulation in force pursuant thereto shall be guilty of a crime and upon conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in the county jail for not more than one year, or by both for each separate violation.

WASH. REV. CODE ANN. §70.94.430(1) (West 1992-1995) *cited in* 59 Fed. Reg. 42,557 (1994)

tampering or rendering "inaccurate any required monitoring device or method."[19] Additionally, EPA found that the state needed to comply with the requirement that there be a state cause of action if the permitting authority fails to act on a permit,[20] and require that "insignificant activities" be covered under the permitting program. EPA found that the existing definition[21] could have excluded some sources that should be covered under Part 70.[22]

For each regional air pollution control agency EPA listed the deficiencies to be corrected before final approval could be granted to them. For the regional programs, which covered the Northwest Air Pollution Authority, the Olympic Air Pollution Control Authority, the Puget Sound Air Pollution Control Agency, the Spokane County Air Pollution Control Authority, and the Southwest Air Pollution Control Authority, EPA required that the criminal penalty provisions for each regulatory authority be brought into compliance with the standard of being able to assess at least a maximum of $10,000 per day per violation in fines.[23] EPA required those programs covering Benton-Franklin

---

[19] 59 Fed. Reg. 42,557 (1994)

[20] Part 70 requires that State law provide a cause of action in State court for the permitting authority's failure to take final action on a permit within the specified time period.

59 Fed. Reg. 42,558 (1994).

[21] **(2) Applicable Requirements.**

(a) Notwithstanding any other provision of this chapter, no emissions unit or activity subject to a federally enforceable applicable requirement (other than generally applicable requirements of the state implementation plan) shall qualify as an insignificant emissions unit or activity. For purposes of this section, generally applicable requirements of the state implementation plan are those federally enforceable requirements that apply universally to all emission units or activities without reference to specific types of emission units or activities.

(b) The application shall list and the permit shall contain all generally applicable requirements that apply to insignificant emission units or activities in the source.

(c) The permit shall not require testing, monitoring, reporting or recordkeeping for insignificant emission units or activities except where generally applicable requirements of the state implementation plan specifically impose these requirements. These requirements identified in the state implementation plan shall be deemed to satisfy the requirements of WAC 173-401-615 and 173-401-630(1).

(d) For insignificant emission units or activities, the source will not need to certify compliance under WAC 173-401-630(5).

WASH. ADMIN. CODE §173-401-530(2)(a-d) (1994) *cited in* 59 Fed. Reg. 42,558 (1994).

[22] 59 Fed. Reg. 42,558 (1994).

[23] 59 Fed. Reg. 42,558-42,559 (1994).

County and Yakima County to implement changes consistent with the changes required in the state regulations.[24]

All the authorities in Washington were committed to assume jurisdiction to implement section 112 of the Act. EPA noted that the Washington authorities had adopted regulations required to implement delegation of Section 112 standards and that delegation of authority would be dealt with in a separate rulemaking.[25] EPA observed that there was no implementing federal regulation to allow implementation of Section 112(g) and that any implementation of Section 112(g) in Washington would be interim and subject to change in the event EPA issued a regulation implementing Section 112(g).[26]

On November 9, 1994, Region 10 issued notice of a final interim approval for all the programs in Washington, with an effective date for this approval of December 9, 1994.[27] EPA refused to delay action on Washington's program during the pendency of the federal regulatory proceedings. With respect to the problems concerning the state's definition of a "Title I modification."[28] EPA granted the program interim approval even with its reservations about the state's definition of a "Title I modification" because EPA was not certain that the state's definition was going to be held incorrect or inadequate[29] and EPA stated that the problems with "Title I modifications" would still have to be

---

[24] 59 Fed. Reg. 42,559 (1994).

[25] 59 Fed. Reg. 42,557 (1994).

[26] 59 Fed. Reg. 42,556-42,557 (1994).

[27] 59 Fed. Reg. 55,813 (1994).

[28] *See supra* text accompanying note 16.

[29] First, EPA has not yet conclusively determined that a narrower definition of "title I modifications" is incorrect and thus a basis for disapproval (or even interim approval). The Agency has received numerous comments on this issue as a result of the August 29, 1994 Federal Register notice, and EPA cannot and will not make a final decision on this issue until it has evaluated all of the comments. Second, EPA believes that the Washington program should not be disapproved because EPA itself has not yet been able to resolve this issue through rulemaking. Moreover, disapproving programs from States such as Washington that submitted their programs to EPA on or before the November 15, 1993 statutory deadline could lead to the perverse result that these States would receive disapprovals, while States which were late in submitting programs could take advantage of revised interim approval criteria if and when these criteria become final. In effect, States would be severely penalized for having made timely program submissions to EPA. Finally, disapproval of a State program for a potential problem that primarily affects permit revision procedures would delay the issuance of Part 70 permits, hampering State/Federal efforts to improve environmental protection through the operating permits system.

59 Fed. Reg. 55,815 (1994)

worked out by all jurisdictions.[30] As with the programs that were granted full final approval, EPA announced its intention to use Washington's preconstruction program as a basis for enforcing Section 112(g) in a rulemaking to be made at a later date,[31] which occurred when EPA first proposed that Washington's Hazardous air pollution program be delegated on February 22, 1995,[32] and this delegation was issued full approval on April 3, 1995.[33]

EPA approved the Washington regulatory scheme, relating to Section 112 implementation, that was submitted on September 29, 1994 for the state and two of its regional control authorities[34] as a method of implementing Section 112, even though the Washington regulations were not specifically designed for this purpose.[35] EPA still was uncertain as to what effect the approval of these regulations would have on subsequent regulations issued by the federal government and requested comment on this issue.[36] Never-the-less, EPA approved the Washington regulations and the necessary changes in Washington's implementation plan became effective on June 2, 1995.[37]

Washington asserted that it had jurisdiction over all the Indian lands[38] but EPA demurred, citing previous case law[39] where Washington had sought to obtain jurisdiction over Indian lands within

---

[30] *Id.*

[31] *Id.*

[32] 60 Fed. Reg. 9802 (1995).

[33] 60 Fed. Reg. 16,289 (1995).

[34] 60 Fed. Reg. 9806 (1995).

[35] *Id.*

[36] EPA requests comment on the appropriateness of making Federally enforceable the terms and conditions of an order that was issued prior to EPA's approval of a State or local rule, provided the order itself complied with all of the requirements of the EPA-approved rule.

60 Fed. Reg. 9809 (1995).

[37] 60 Fed. Reg. 28,726 (1995).

[38] In support of this contention, Ecology generally asserts that Ecology has "necessary jurisdiction to regulate Title V sources throughout the state." Ecology also appears to be alleging that, at a minimum, it has authority over non-Indian owned Title V sources on non-Indian owned fee lands within reservations. Ecology states that the law presumes it has authority over such sources and that the legal opinion accompanying its Title V program submittal should be interpreted to apply consistently at least to all fee lands within the exterior boundaries of the State. Ecology comments that "[c]ourts have only found for tribal jurisdiction when the weight of tribal interests is great enough" and that "[s]everal potential

the state of Washington for the purpose of implementing similar state permitting provisions under the Resource Conservation and Recovery Act.[40] In the final analysis, EPA concluded that Washington presented no evidence of any authority to regulate sources within reservations in Washington, except where authorized in the Puyallup reservation.[41] EPA observed that the Federal Indian policy was intended to enhance the principals of Indian "self-government."[42] This issue will be discussed later in this paper.[43]

EPA noted that the criminal authorities for the state program and several of the local programs needed to be brought into line with the Federal regulatory standard, but issued interim approval never-the-less for all the programs in Washington.[44] Washington must submit proposed changes to its programs to comply with EPA's edicts by May 9, 1996 and a fully approved program must be in effect by November 9, 1996, in order to avoid sanctions or the implementation of a Federal permit program.[45]

---

major sources owned by non-[I]ndians with no tribal relationships can be found in the State on fee lands within reservations."

59 Fed. Reg. 55,816 (1994)

[39] Washington Department of Ecology v. Environmental Protection Agency 752 F.2d 1465 (9th Circ. 1985), (hereafter Ecology v. EPA) *cited in* 59 Fed. Reg. 55,816 (1994).

[40] 42 U.S.C.A. §§6901-6992k (1983-1995).

[41] 59 Fed. Reg. 55,818 (1994).

[42] In keeping with the principal of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

59 Fed. Reg. 55,818 (1994) (citations omitted).

[43] *See infra* Part VII.A.

[44] 59 Fed. Reg. 55,818-55,819 (1994).

[45] 59 Fed. Reg. 55,819 (1994).

B. New Mexico

On May 19, 1994, EPA proposed interim approval status for the permit program of the state of New Mexico[46] and issued a final rulemaking on November 18, 1994, granting the state program interim approval status effective December 19, 1994.[47] There is one local program in New Mexico, and the program has jurisdiction over City of Albuquerque and Bernalillo County [hereafter "Albuquerque"]. The program for that jurisdiction was proposed for interim approval status on January 10, 1995,[48] with an effective date of March 13, 1995, for final approval of the program in a direct final rulemaking. EPA received comments on the Albuquerque program, but did not deem these comments of the character that would warrant a reopening of the rulemaking process and allowed the Albuquerque program to be approved as originally proposed.[49]

The New Mexico authorizing statute was amended to reflect the need to permit sources according to the dictates of Subchapter V.[50] New Mexico did not request any authority to implement Subchapter V over any Indian lands within the state and Region 6 observed that another EPA Region, Region 9 would have jurisdiction over part of the Indian lands in New Mexico when a final decision was made as to the disposition of permitting programs for areas under Indian control.[51] EPA found the submission by New Mexico generally met the requirements of Subchapter V and 40 C.F.R. Part 70 and

---

[46] 59 Fed. Reg. 26,158 (1994).

[47] 59 Fed. Reg. 59,656 (1994).

[48] 60 Fed. Reg. 2527 (1995).

[49] 60 Fed. Reg. 13,046 (1995).

[50] N.M. STAT. ANN. §74-2-7(A) (Michie 1978-1995).

[51] To date, no tribal or Pueblo government in New Mexico has authority to administer an independent air program in the State. Upon promulgation of the Indian air regulations, the Indians will then be able to apply as a State, and receive the authority from EPA, to implement an operating permits program under title V of the 1990 Amendments. The Navajo Nation lands, including those in New Mexico, are administered under the jurisdiction of EPA Region 9. The State of New Mexico recognizes the five (5) reservations and nineteen (19) Pueblos throughout the lands of the State.

59 Fed. Reg. 26,159 (1994).

issued a summary of the New Mexico provisions.[52] New Mexico proposed to charge two separate rates for pollutants, both of which were well below the presumptive minimum of twenty-five dollars per ton, but EPA found that the proposed fee schedule would be adequate to ensure that the program would be self-supporting.[53]

With respect to delegation of Section 112 standards, and Section 112(g) in particular, New Mexico elected to implement this program through the preconstruction permitting process as with other states that have both interim and full approval, and New Mexico committed to establishing an acid rain program by the beginning of 1995.[54]

The sole ground for requiring that New Mexico not be awarded full approval status was the criminal enforcement provisions that were enacted by the state and that the statute would have to be changed to comply with the Federal regulations.[55] In reaction to this, New Mexico has since changed its criminal provisions to deal with EPA's concerns.[56] The problem of the "Title I Modification"

---

[52] The following requirements,... are addressed in ... the State's submittal: (A) Applicability criteria, including any criteria used to determine insignificant activities or emissions levels (40 CFR 70.4(b)(2)): AQCR 770.II., "List of Insignificant Activities"; (B) Provisions for continuing permits or permit terms if a timely and complete application is submitted, but action is not taken on a request prior to permit expiration (40 CFR 70.4(b)(10)): AQCR 770.IV A.4.; (C) Provisions for action on permit applications (40 CFR 70.4(b)(6)): AQCR 770.IV.A.3.; (D) Provisions for permit content, (including 40 CFR 70.4(b)(16)): all applicable requirements: AQCR 770.III.C.1.; a fixed term: AQCR 770.III.C.2.; monitoring and related record keeping and reporting requirements: AQCR 770.III.C.3. through 5.; source compliance requirements: AQCR 770.III.C.7.; (E) Operational flexibility provisions (40 CFR 70.4(b)(12)): AQCR 770.III.C.8.; (F) Provisions for permit issuance, renewals, reopenings and revisions, including public, EPA and affected State review to be accomplished in an expeditious manner (40 CFR 70.4(b)(13) and (16)): AQCR 770.VI.; and (G) If the permitting authority allows off-permit changes, provisions assuring compliance with §§ 70.4(b)(14) and (15): AQCR 770.C.9. The AQCR regulations, in section 770.IV.(H), provide that applicants can receive variances from non-Federal conditions only. The State prevents any source from receiving a variance from any AQCR 770 or part 70 requirements.

59 Fed. Reg. 26,160 (1994).

[53] *Id.*

[54] 59 Fed. Reg. 26,160-26,161 (1994).

[55] 59 Fed. Reg. 26,159 (1994).

[56] D. At any source required to have an operating permit pursuant to Section 502 of the federal act, any person who knowingly commits any violation of any applicable standard, regulation or requirement under the Air Quality Control Act or the federal act, any term or condition of an operating permit or any emission fee or filing requirement in any operating permit regulation of the environmental improvement board or the local board is guilty of a fourth degree felony and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000) per day per violation or by imprisonment of not more than eighteen months, or both.

1995 N.M. LAWS 162 (codified as amended at N.M. STAT. ANN. §74-2-14(D) (Michie 1978-1995)).

definition[57] was left in the air again, because EPA felt that it would be inequitable to penalize New Mexico, and other states for submitting their permitting programs in a timely manner, for the failure of EPA to finalize the Federal definition of a Title I modification.[58]

For the Albuquerque program, EPA found that some changes were required with respect to the criminal provisions because the city and county fines had were too low.[59] Otherwise, the submitted regulations were found to be adequate by EPA.[60] The term "Title I modification" was once again left in a suspended state and in the case of the Albuquerque program, EPA elected to proceed with the rulemaking process rather than wait for the outcome of any pending rulemakings.[61] In order to obtain full approval, the state criminal law and the local ordinances governing criminal fines would have to be changed. Albuquerque is required to submit evidence of complying changes by June 10, 1996 and have a fully approved program in effect by January 10, 1997 in order to avoid sanctions.[62]

---

[57] " Title I Modification" means any modification under sections 111 or 112 of the federal Act and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Parts C and D of the federal Act.

New Mexico Air Quality Control Regulation 770; Part I (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.)

[58] 59 Fed. Reg. 59,659 (1994).

[59] 60 Fed. Reg. 2529 (1995).

[60] The City submitted AQC 41, the Operating Permits Regulations for the City ... The following requirements, ... are addressed in the operating permits program plan and in AQC 41... as follows: (A) Applicability criteria, including any criteria used to determine insignificant activities or emissions levels (40 CFR 70.4(b)(2)): AQC 41.02, "List of Insignificant Activities"; (B) Provisions for continuing permits or permit terms if a timely and complete application is submitted, but action is not taken on a request prior to permit expiration (40 CFR 70.4(b)(10)): AQC 41.04(A)(4); (C) Provisions for action on permit applications (40 CFR 70.4(b)(6)): AQC 41.04(A)(3); (D) Provisions for permit content (including 40 CFR 70.4(b)(16)): all applicable requirements: AQC 41.03(C)(1); a fixed term: AQC 41.03(C)(2); monitoring and related recordkeeping and reporting requirements: AQC 41.03(C)(3) through (5); source compliance requirements: AQC 41.03(C)(7); (E) Operational flexibility provisions (40 CFR 70.4(b)(12)): AQC 41.03(C)(8); (F) Provisions for permit issuance, renewals, reopenings and revisions, including public, the EPA and affected State review to be accomplished in an expeditious manner (40 CFR 70.4(b)(13) and (16)): AQC 41.04; and (G) If the permitting authority allows off-permit changes, provisions assuring compliance with sections 70.4(b)(14) and (15): AQC 41(C)(9). The AQC regulations in section 41.04(H) provide that applicants can receive variances from non-Federal conditions only.

60 Fed. Reg. 2530 (1995).

[61] 60 Fed. Reg. 2530-2531 (1995)

[62] 60 Fed. Reg. 2533 (1995).

C. Oregon

The Oregon legislature enacted statutory authority in 1991 that enabled the Oregon Department of Environmental Quality to promulgate appropriate regulations to implement Subchapter V.[63] EPA found that the submissions from Oregon substantially met the requirements of Part 70.[64] There is one local authority in Oregon, the Lane Regional Air Pollution Control Authority which elected to implement the Oregon regulations without adopting its own regulations.[65] The authority of the Oregon programs did not extend to any Indian reservations as there was no showing by the state that such authority existed for Oregon to regulate sources within Indian reservations.[66] EPA proposed to grant interim approval to both programs on September 14, 1994[67] and the interim approval of the programs was granted on December 2, 1994, with the programs becoming effective and Federally approved on January 3, 1995.[68]

While not a grounds for determining whether or not Oregon's program would be granted interim or final status, EPA observed that Oregon had enacted a self-audit privilege,[69] that if enforced to the detriment of Oregon's abilities to implement Subchapter V, would require EPA to withdraw the authority of Oregon to enforce its Subchapter V program. EPA noted that the position of the agency with respect to the self-audit privilege was yet to be determined, and EPA also viewed this provision as

---

[63] OR. REV. STAT. §468A.300-330 (1992-1995) *cited in* 59 Fed. Reg. 47,105-47,106 (1994).

[64] The Oregon state operating permit regulations found within the Oregon Administrative Rules (OAR), Chapter 340, Division 28, including proposed rule revisions, and the authorizing statutes substantially meet the requirements of 40 CFR part 70, §§ 70.2 and 70.3 for applicability, §§ 70.4, 70.5, and 70.6 for permit content including operational flexibility, § 70.7 for public participation and minor permit modifications, § 70.8 for permit review by EPA and affected States, § 70.5 for criteria which define insignificant activities, § 70.11 for requirements for enforcement authority, and §70.5 for complete application forms.

59 Fed. Reg. 47,105 (1994).

[65] 59 Fed. Reg. 47,106 (1994).

[66] *Id.*

[67] 59 Fed. Reg. 47,105 (1994).

[68] 59 Fed. Reg. 61,820 (1994).

[69] OR. REV. STAT. §468.963 (1992-1995) *cited in* 59 Fed. Reg. 47,106 (1994).

being external to the approvable parts of the Oregon program.[70] Oregon's fee structure was set at the presumptive minimum of twenty-five dollars per ton with a base fee of $2,500 for all sources subject to the state permit program, and the state can raise the fee by regulation if this is necessary to sustain the reasonable costs of the program.[71]

With respect to Section 112 implementation, EPA approved a separate set of regulations[72] found to be acceptable as a transitional element for the purposes of enforcing Section 112, even while EPA's regulations were still in a state of flux. Oregon law prohibits "permitting authorities from adopting prospective Federal regulations,"[73] so EPA decided to leave implementation of these rules for a later rulemaking. EPA did comment that Oregon procedures seemed to implement Section 112 appropriately.[74]

The grounds for denying Oregon and Lane County full approval and for granting them interim approval were a broader affirmative defense[75] "than the affirmative defense under part 70 for emissions

---

[70] 59 Fed. Reg. 47,106 (1994).

[71] *Id.*

[72] OR. ADMIN. R. 340-32 (1994) *cited in* 59 Fed. Reg. 47,107 (1994).

[73] 59 Fed. Reg. 47,107 (1994).

[74] *Id.*

[75] 468.959. Upset or bypass as affirmative defense.

(1) It is an affirmative defense to any offense under ORS 468.922 to 468.946 that the alleged violation was the result of an upset or bypass.

(2) For purposes of this section:

(a) "Bypass" means the temporary discharge of waste or an air contaminant in violation of ORS chapter 465, 466, 468, 468A or 468B or any rule adopted or order or permit issued thereunder, under circumstances in which the defendant reasonably believed that the discharge was necessary to prevent loss of life, personal injury or severe property damage, or to minimize environmental harm.

(b) "Upset" includes an exceptional and unexpected occurrence in which there is unintentional and temporary violation of the requirements of ORS chapter 465, 466, 468, 468A, 468B, 761 or 767 or of any rule adopted or permit or order issued under ORS chapter 465, 466, 468, 468A, 468B, 761 or 767 because of factors beyond the reasonable control of the regulated person or entity. "Upset" does not include a violation caused by:

(A) Operational error;

(B) Improperly designed facilities;

(C) Lack of preventive maintenance; or

in excess of a technology-based emissions limitation caused by an 'emergency'"[76] and that the statutory authority for the technical assistance visit,[77] the Oregon small business assistance program could have exempted a "source from follow-up inspections or enforcement activities that 'result from' observations made during a technical assistance visit."[78] EPA also expressed reservations about the corporate criminal liability statute that exists in Oregon,[79] but after receiving a supplemental opinion

---

(D) Careless or improper operation.

(3) To establish the affirmative defense of upset or bypass, the defendant must prove the occurrence of an upset or bypass and that the defendant:

(a) Reported the upset or bypass to the Department of Environmental Quality or other appropriate agency within 24 hours or as required by statute, rule, permit or order, whichever is sooner, and, if the original notice was oral, delivered written notice to the Department of Environmental Quality or other agency with regulatory jurisdiction within four calendar days;

(b) Submitted complete documentation of the upset or bypass to the Department of Environmental Quality or other agency with regulatory jurisdiction as required by statute, rule, order or permit; and

(c) Took appropriate corrective action, including action to minimize damage, as soon as reasonably possible.
(4) It is an affirmative defense to an offense under ORS 468.922 to 468.946 that the defendant:
(a) Did not cause or create the condition or occurrence that constitutes the offense;
(b) Reported the condition or occurrence to the Department of Environmental Quality or other agency with regulatory jurisdiction as soon as practicable after the defendant discovered it; and
(c) Took reasonable steps to correct the violation.
OR. REV. STAT. §468.959 (1992-1995) *cited in* 59 Fed. Reg. 61,827 (1994).

[76] 59 Fed. Reg. 61,827 (1994).

[77] (4)(a) Onsite technical assistance for the development and implementation of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program shall not result in inspections or enforcement actions, except that the department may initiate compliance and enforcement actions immediately if, during onsite technical assistance, there is reasonable cause to believe a clear and immediate danger to the public health and safety or to the environment exists.

OR. REV. STAT. §468A.330(4)(a) (1992-1995) *cited in* 59 Fed. Reg. 61,827 (1994).

[78] 59 Fed. Reg. 61,827 (1994).

[79](1) A corporation is guilty of an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of employment and in behalf of the corporation and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation; or

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the corporation.

(2) As used in this section:

(a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation who exercises authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees, or any other agent in a position of comparable authority.

from the Oregon Attorney General, concluded that the corporate criminal liability statute was the equivalent of the Federal standard, and thus not a bar to interim or full approval.[80]

Oregon's definition of a "Title I Modification" would be left alone pending the outcome of EPA's own rulemaking on the issue.[81] With respect to the implementation of Section 112(g), EPA concluded that Oregon's existing preconstruction program would be adequate even though Oregon had no program specifically designed to implement Section 112(g).[82] Oregon has until July 2, 1996 to submit a corrective program, which must be in effect prior to the end of the interim approval which expires January 2, 1997.[83]

D. Hawaii

Hawaii submitted its program to EPA on December 20, 1993 for approval. EPA proposed to grant interim approval to this program on July 26, 1994,[84] and EPA issued a final rulemaking on December 1, 1994, that granted Hawaii interim approval effective that same day.[85] EPA found that the Hawaiian implementing statute[86] and regulations were sufficient for approval of interim status. With respect to implementation of Section 112, EPA found that the Hawaiian statutes authorized it to

---

OR. REV. STAT. §161.170 (1992-1995) *cited in* 59 Fed. Reg. 47,108 (1994).

[80] 59 Fed. Reg. 61,825 (1994)

[81] 59 Fed. Reg. 61,823 (1994).

[82] EPA is aware that Oregon does not have a program designed specifically to implement section 112(g); however, Oregon does have several preconstruction review programs that can serve as procedural vehicles for rendering Federally enforceable case-by-case MACT or offset determinations. Oregon's preconstruction review programs may be used during the transition period between title V approval in Oregon and EPA approval of Oregon regulations to implement Section 112(g) to grant relief from the prohibition imposed by section 112(g).

59 Fed. Reg. 61,823 (1994).

[83] 59 Fed. Reg. 61,827 (1994).

[84] 59 Fed. Reg. 37,957 (1994).

[85] 59 Fed. Reg. 61,549 (1994).

[86] HAW. REV. STAT. §§ 347B-1 to -47 (1985-1995) *cited in* 59 Fed. Reg. 37,958 (1994).

implement Section 112,[87] and Hawaii was exempt from implementing the Acid Rain requirements as it is one of the jurisdictions that is not in the "48 contiguous United States."[88]

There were three reasons for granting Hawaii interim, as opposed to full approval. The first reason revolved around a clause in the Hawaiian regulations that gave the director of the Hawaiian Department of Health the discretion to determine the definition of an "insignificant activity."[89] The second reason was that the permit shield in the Hawaiian regulations did not allow sources recently subject to the Subchapter V requirements to operate without a permit if a complete and timely application was pending before the regulatory agency.[90] Finally, EPA required Hawaii to limit the emissions from ground based engines at airfields[91] on the basis that this exemption did not meet with an existing EPA emissions study on this type of source warranting an exemption.[92]

---

[87] HAW. REV. STAT. §342B-12 (1985-1995) *cited in* 59 Fed. Reg. 37,958 (1994).

[88] 59 Fed. Reg. 37,959 (1994).

[89] (f) Insignificant activities based on size, emission level, or production rate, are as follows:…

(7) Other activities as determined on a case-by-case basis to be insignificant by the director.

HAW. ADM. R. §11-60.1-87(f)(7) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 37,959 (1994).

[90] (a) Except as provided in subsections (d) and (e) and section 11-60.1-87, no person shall burn used or waste oil or begin construction, reconstruction, modification, relocation, or operation of an emission unit or air pollution control equipment of any covered source without first obtaining a covered source permit from the director. The construction, reconstruction, modification, relocation, or operation shall continue only if the owner or operator of a covered source holds a valid covered source permit.

HAW. ADM. R. §11-60.1-82(a) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 37,959 (1994).

[91] (11) Diesel fired portable ground support equipment used exclusively to start aircraft or provide temporary power to aircraft prior to start-up;

HAW. ADM. R. §11-60.1-82(g)(11) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 61,550 (1994).

[92] [A] prior EPA emissions study (EPA-450/4-81-026d) shows that the emissions from engines used to provide auxiliary power to aircraft could potentially be large. Therefore, Hawaii must delete or cap this permit exemption unless EPA receives new information justifying the exemption.

59 Fed. Reg. 61,550 (1994).

Hawaii was granted approval to implement Section 112 because the state elected to enforce Federal standards as they were whenever these standards would be pronounced.[93] The interim approval status for Hawaii lasts until December 1, 1996, and the state must submit a program to effect complete corrective action no later than June 3, 1996 to avoid the imposition of sanctions.[94]

E. Arkansas

On September 19, 1994, Region 6 proposed that the state permitting program of Arkansas be granted interim approval,[95] with the lead agency for responsibility in this area being the Arkansas Department of Pollution Control and Ecology, known by its acronym of ADPCE. EPA observed that no application was made for the Indian lands within the state and found that the Arkansas regulation[96] closely tracked the Federal Operating Permit regulation.[97] Arkansas statutory authority for a permit program predates the Federal permit program.[98]

The grounds for proposing that Arkansas program be granted interim approval included a need to coordinate the Prevention of Significant Deterioration (PSD)[99] as set forth in existing state regulations, which were included in the state implementation plan, with the submitted permit regulations;[100] the minor modification procedures allowed an increase in emissions for some sources,

---

[93] Hawaii has informed EPA that the State intends to obtain the regulatory authority necessary to accept delegation of section 112 standards by incorporating section 112 standards by reference. This program for delegations applies to all sources covered by the part 70 program, which includes non-major sources subject to section 112 requirements.

59 Fed. Reg. 61,551 (1994).

[94] 59 Fed. Reg. 61,551 (1994).

[95] 59 Fed. Reg. 47,828 (1994).

[96] Regulation 26, Regulations of the Arkansas Operating Permit Program *cited in* 59 Fed. Reg. 47,829 (1994).

[97] 59 Fed. Reg. 47,829 (1994).

[98] ARK CODE ANN. §8-4-311 (Michie 1987-1995)

[99] CAA §§160-169B, 42 U.S.C.A. §§7470-7492 (1983-1995).

[100] The Arkansas operating permits program is contained in Regulation 26, but several applicable requirements are found in Regulation 19 (e.g. PSD requirements at 19.9). The State of Arkansas has submitted a revision to Regulation 19 and the EPA is currently undertaking a review of the revision. The EPA will continue to work closely with the State to ensure

but was internally inconsistent;[101] and the state must identify the meaning of "prompt" with respect to the reporting of deviations from permit conditions.[102] The final rulemaking on this program is still pending.

F. Wisconsin

On October 19, 1994, Region 5 proposed that the Wisconsin program be granted interim approval[103] and this status was finalized with a final rulemaking on March 6, 1995.[104] Wisconsin submitted its program for the purpose of covering all sources within Wisconsin, "except for activities conducted by Indians on Indian reservation lands."[105] EPA noted that there was no additional justification or evidence of Wisconsin's ability to regulate sources within Indian reservations.[106] For the most part, Wisconsin's statutory[107] and regulatory scheme[108] for the establishment of a Federally authorized permit program complied with the provisions of Title V and Part 70.

---

consistency between the SIP permits system and operating permits systems in Arkansas. The EPA reserves comment on the SIP revision until such time as review is completed.

59 Fed. Reg. 47,830 (1994).

[101] (b) Minor permit modification applicability. The minor permit modification process is an expedited procedure that allows a source to make changes involving limited emissions increases without a public notice process or a preconstruction permit. Minor permit modification procedures may be used only for those permit modifications that:

(1) Involve emissions increases of not over 20% of the applicable definition of major source, or 15 tons/year of PM(10), or 0.6 tons/year of lead (potential to emit basis), whichever is less, of a regulated air pollutant over permitted rates;

(7) Are not modifications under any provision of title I of the Act.

Regulation 26, Section 10(b)(1), (7) Regulations of the Arkansas Operating Permit Program, (Copr (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 47,829 (1994).

[102] 59 Fed. Reg. 47,831 (1994).

[103] 59 Fed. Reg. 52,743 (1994).

[104] 60 Fed. Reg. 12,128 (1995).

[105] 59 Fed. Reg. 52,744 (1994).

[106] *Id.*

[107] WIS. STAT. ANN. §§144.391 to .399 (West 1989-1995)

[108] Wisconsin's operating permits program, including the operating permits program regulations (Chapters Natural Resources (NR) 400, 406, 407, 409, 410, 436, 438, 439, 484, 490, and 494, Wisconsin Administrative Code) substantially meet the requirements of 40 CFR part 70.

With respect to Section 112 implementation, EPA found that the proposed permits program was adequate to implement that section by using the Wisconsin statute[109] that allowed for the implementation of Federal permit requirements under Subchapter V. In addition, EPA proposed to use the preconstruction program that Wisconsin established as the means for implementing Section 112, and that such approval would only be for an interim time of eighteen months after EPA promulgated its own regulations on the matter.[110] EPA found that there were several grounds for granting interim status as opposed to full status for Wisconsin's program.

The first of a series of changes would be to amend Wisconsin's regulations to provide that all applications be truthful and that there be possible criminal consequences for submitting a false application.[111] The second of these changes would be required to extending the permit shield to all sources,[112] where only existing sources possessed this shield.[113] The corresponding regulation[114]

---

59 Fed. Reg. 52,744 (1994)

[109] The department may prescribe conditions for an air pollution control permit to ensure compliance with §§ 144.30 to 144.426 and 144.96 and rules promulgated under these sections and to ensure compliance with the federal clean air act if each condition is one of the following and if each condition is applicable to the source:...

(12) Other conditions applicable to the source under the federal clean air act.

WIS. STAT. ANN. §144.394(12) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[110] 59 Fed. Reg. 52,745 (1994).

[111] *Id.*

[112] (b) Operation permit. Except as provided in par. (a)2 or sub. (6), no person may operate a new source or a modified source unless the person has an operation permit from the department.

WIS. STAT. ANN. §144.391(1)(b) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[113](7) Operation continued during application. If a person timely submits a complete application for an existing source under sub. (1) and submits any additional information requested by the department within the time set by the department, the existing source may not be required to discontinue operation and the person may not be prosecuted for lack of an operation permit until the department acts under sub. (6).

WIS. STAT. ANN. §144.3925(7) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[114] NR 407.08 Dates by Which Permits Are Required.

(1) Existing Sources. Except as provided in §144.3925 (7), Stats., no stationary source which is required to obtain an operation permit under §144.391(2)(a), Stats., and this chapter may operate after the date specified for that source in Table 1 of §NR 407.04 without an operation permit issued by the department.

(2) New or Modified Sources. Except as provided in §144.391(1)(a)2, Stats., no new or modified source which is required to obtain an operation permit under §144.391(1)(b), Stats., and this chapter may operate without an operation permit issued by the department.

dealing with these sections would also have to be changed to cure the cited deficiency. The third required change would be to authorize "operational flexibility" for ""new' and 'modified sources'" as required in the Federal regulation.[115] Wisconsin's statute[116] and implementing regulation[117] only provided operational flexibility provisions for "existing sources" and both would have to be changed to cure this deficiency. Wisconsin's statute[118] would have to be amended to authorize denial of permits to noncomplying sources, a grounds for denial which does not presently exist, and of course, the corresponding regulation would also have to be changed to remedy the same problem.[119] The last

---

WIS. ADMIN. CODE §NR 407.08(1-2) (Copr. (c) 1995 ERM Computer Information Services, Inc.) (May 1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[115] 40 C.F.R. §70.4(b)(12) (1994) *cited in* 59 Fed. Reg. 52,745 (1994).

[116] (4m) Permit flexibility. The department shall allow a person to make a change to an existing source that has an operation permit, or for which the person has submitted a timely and complete application for an operation permit, for which the department would otherwise first require an operation permit revision, without first requiring a revision of the operation permit if the change is not a modification, as defined by the department by rule, and the change will not cause the existing source to exceed the emissions allowable under the operation permit, whether expressed as an emission rate or in terms of total emissions. Except in the case of an emergency, a person shall notify the department and, for permits required under the federal clean air act, the administrator of the federal environmental protection agency in writing at least 21 days before the date on which the person proposes to make a change to an existing source under this subsection. A person may not make a proposed change to an existing source if the department informs the person before the end of that 21-day period that the proposed change is not a change authorized under this subsection. The department shall promulgate rules establishing a shorter time for advance notification of changes under this subsection in case of emergency.

WIS. STAT. ANN. §144.391(4m) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[117] WIS. ADMIN. CODE §NR 407.025 (Copr. (c) 1995 ERM Computer Information Services, Inc. (May 1995)) *cited in* 59 Fed. Reg. 52,745 (1994).

[118] (6) Department determination; issuance. (a) The department shall approve or deny the operation permit application for an existing source . The department shall issue the operation permit for an existing source if the criteria established under §§144.393 and 144.3935 are met. The department shall issue an operation permit for an existing source or deny the application within 18 months after receiving a complete application, except that the department may, by rule, extend the 18-month period for specified existing sources by establishing a phased schedule for acting on applications received within one year after the effective date of the rule promulgated under sub. (1) that specifies the content of applications for operation permits. The phased schedule may not extend the 18-month period for more than 3 years. (b) The department shall approve or deny the operation permit application for a new source or modified source. The department shall issue the operation permit for a new source or modified source if the criteria established under §144.393 are met. The department shall issue an operation permit for a new source or modified source or deny the application within 180 days after the permit applicant submits to the department the results of all equipment testing and emission monitoring required under the construction permit.

WIS. STAT. ANN. §144.3925(6) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[119] NR 407.09 Permit Content.

(1) Standard Permit Requirements. Each permit issued under this chapter shall include, at a minimum, the following elements:

(f) Provisions stating the following:

statutory change that would be required revolved around the need for the state to be able to issue operating permits to noncompliant "new" and "modified" sources as set forth in the Federal regulation.[120]

EPA also required the modification of several regulations which dealt with permits, compliance plans, and related documentation for noncomplying sources.[121] EPA also required the modification of Wisconsin's regulations to cover all sources that must be permitted under the Federal regulation.[122] Even with all this, EPA excluded from coverage of the Wisconsin program some sources.[123] EPA did not lay the blame for all these changes at the feet of Wisconsin, but rather assumed some of the blame gratuitously for its lack of guidance on prohibitions.[124]

---

1. The permittee has the duty to comply with all conditions of the permit. Any noncompliance with the operation permit constitutes a violation of the statutes and is grounds for enforcement action; for permit suspension, revocation or revision; or, if allowed under §144.3925 (6), Stats., for denial of a permit renewal application.

WIS. ADMIN. CODE §NR 407.09(1)(f)1 (Copr. (c) 1995 ERM Computer Information Services, Inc. (May 1995)) *cited in* 59 Fed. Reg. 52,745 (1994).

[120] 144.3935. Criteria for operation permits for existing sources

(1) Issuance to sources not in compliance; federal objection.

(a) Notwithstanding §144.393, the department may issue an operation permit for an existing source that does not comply with the requirements in the operation permit, in the federal clean air act, in an implementation plan under §144.31(1)(f) or in §144.393 when the operation permit is issued if the operation permit includes all of the following:

1. A compliance schedule that sets forth a series of remedial measures that the owner or operator of the existing source must take to comply with the requirements with which the existing source is in violation when the operation permit is issued.

2. A requirement that, at least once every 6 months, the owner or operator of the existing source submit reports to the department concerning the progress in meeting the compliance schedule and the requirements with which the existing source is in violation when the operation permit is issued.

WIS. STAT. ANN. §144.3935(1)(a)(1-2) (West 1989-1995) *cited in* 59 Fed. Reg. 52,745 (1994).

[121] WIS. ADMIN. CODE §§NR 407.05(1), (4), 407.09(4) (Copr (c) 1995 ERM Computer Information Services, Inc. (May 1995)) *cited in* 59 Fed. Reg. 52,745-52,746 (1994).

[122] WIS. ADMIN. CODE §NR 407.03(1) (Copr (c) 1995 ERM Computer Information Services, Inc. (May 1995)) *cited in* 59 Fed. Reg. 52,746 (1994).

[123] EPA is not proposing to include "new" and "modified" part 70 sources that are not in compliance (as defined by Wisconsin's operating permits program), and part 70 sources covered by Chapter NR 407.03(1)(d), (g), (h), (o), (s), (sm), and (t) as part of the interim approval of Wisconsin's program. The exclusion of these source categories from approval, however, does not affect Wisconsin's obligation to fix these deficiencies in order to be eligible for full approval.

59 Fed. Reg. 52,746 (1994).

[124] EPA considers the lack of EPA guidance in developing prohibitory rules at the time Wisconsin promulgated its operating permits regulations to be a compelling reason for granting source category limited interim approval.

EPA received comments concerning its proposal before going final with the decision to grant interim approval to Wisconsin. Wisconsin asserted that it had jurisdiction over activities conducted by non-Indians within the external boundaries of Indian reservations. EPA did not agree with this assertion because Wisconsin did not identify any specific sources over which it could exert control that were within the boundaries of Indian reservations.[125] The jurisdiction over Indian lands will be discussed later in this work.[126]

Other comments were received regarding the Section 112 implementation proposal, acid rain provisions, operational flexibility and denial of renewal applications for cause.[127] Some comments led to the change in the requirements for full approval from the proposed notice. In the case of reopenings of permits, EPA changed the requirement to only be the minimum as set forth in the applicable Federal regulation[128] EPA did not change its position after receiving comments on permitting exemptions, source category limited interim approval, the effect of proposed amendments to Part 70 and particulate matter.[129] Wisconsin has until October 7, 1996, to submit a corrective program, which must be approved by the expiration date of the interim status, which is April 7, 1997, or sanctions may be imposed.[130]

---

59 Fed. Reg. 52,746 (1994).

[125] 60 Fed. Reg. 12,131-12,132 (1995).

[126] *See infra* part VII.A.

[127] 60 Fed. Reg. 12,132-12,134 (1995).

[128] 40 C.F.R. §70.7(f)(1) (1994) *cited in* 60 Fed. Reg. 12,134 (1995).

[129] 60 Fed. Reg. 12,134-12,136 (1995).

[130] 60 Fed. Reg. 12,136 (1995).

G. Colorado

On November 5, 1993,[131] Colorado submitted its statutory[132] and regulatory program to EPA, and EPA proposed to grant interim approval to this program on October 14, 1994.[133] This program was granted interim approval on January 24, 1995, with an effective date of February 23, 1995.[134]

EPA concluded that the program generally met the provisions for approval as a valid program under Subchapter V. EPA made some observations as to problems that existed with the program. Among these was the lack of a definition of "prompt" in Colorado's regulations with respect to the reporting of deviations from permit conditions. EPA noted that this definition could be in each permit, as proposed by Colorado,[135] but it would exercise its veto authority if not satisfied with the requirements placed in each permit.[136] Another potential problem that EPA noted was the creation of an evidentiary privilege for environmental self-audits "which prevents the admission of voluntary environmental audit reports as evidence in any civil, criminal or administrative proceeding, with certain exceptions. It is not clear at this time what effect, if any, this privilege might have on Subchapter V enforcement actions."[137] EPA regarded the statutory provision[138] as wholly external to the federally

---

[131] 59 Fed. Reg. 52,123 (1994).

[132] *See generally* COLO. REV. STAT. ANN. §§25-7-101 to -135 (West 1990-1995).

[133] *Id.*

[134] 60 Fed. Reg. 4563 (1995).

[135] C. An operating permit shall contain, at a minimum, the following:

7. Each permit shall incorporate all applicable reporting requirements, and shall require the following:

b. prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. Each permit shall contain a definition of prompt reporting in relation to the degree and type of deviation likely to occur and the applicable requirements. Generally " prompt" reporting shall entail reporting as required in paragraph no. 7.a. above, requiring submission of reports of deviations from permit requirements at least every six (6) months, except as otherwise specified by the division in the permit. Prompt reporting, for this purpose, does not constitute an exception to the requirements of section viii relating to reporting of emergency events for the purpose of avoiding enforcement actions.

1001-5 COLO. CODE REGS. §V.C.7.b. (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 52,124 (1994).

[136] 59 Fed. Reg. 52,124 (1994).

[137] *Id.*

approved program and enunciated that EPA was still trying to determine a position on the issue of self-audits, and immunity.

Another area of potential controversy identified by EPA was in the area of Permit fees, where Colorado's fees are well below the presumptive minimum of twenty-five dollars per ton of generated pollutants.[139] In fact, these amounts are less than half of the presumptive minimum for as late as 1997, but EPA was still satisfied that Colorado was able to pay for its program with the proposed fees.[140] EPA proposed to delegate Section 112 authority to Colorado, finding that the permit program was adequate for this purpose, and proposed to use the preconstruction program in effect in Colorado to effect this effort, as it had done in so many other places.[141] EPA found that one of Colorado's requirements,[142] that the accidental release program be funded by the Federal government before implementation, was unacceptable. EPA balked at this condition and cited it as one ground for the prevention of Colorado being granted full approval.

The second ground for denial of full status was that Colorado's procedures needed to be modified so that the procedures "for adding additional exemptions to the insignificant activities list, ... require approval by the EPA of any new exemptions before such exemptions can be utilized by a

---

[138] COLO. REV. STAT. ANN. §13-25-126.5 (West 1990-1995) *cited in* 59 Fed. Reg. 52,124 (1994).

[139] CAA §502(b)(3)(B)(i), 42 U.S.C.A. §7661a(b)(3)(B)(i) (1983-1995).

[140] The revised permit fee demonstration also included a workload analysis which estimated the annual cost of running the program to be $ 1.87 million for fiscal year 1994/1995; and a new fee structure that consists of a $ 9.02 per ton fee for regulated air pollutants for fiscal year 1994, to be increased on an annual basis to $ 10.87 in fiscal year 1995, $ 13.66 in fiscal year 1996 and $ 11.58 in fiscal year 1997; with the additional HAP and permit application processing fees given above.

59 Fed. Reg. 52,124 (1994).

[141] 59 Fed. Reg. 52,124-52,125 (1994).

[142] (5) The implementation and effectiveness of this section shall be contingent on the receipt of funding from the federal government in sufficient amount to totally fund the division's costs in implementing this section; except that the small business stationary source technical and environmental compliance assistance program shall be funded as provided in section 25-7-114.7.

COLO. REV. STAT. ANN. §25-7-109.6(5) (West 1990-1995) *cited in* 59 Fed. Reg. 52,125 (1994).

source."[143] After receiving comments, EPA did not alter its conditions for full approval when publishing the final notice granting interim approval to this program. In addition, EPA did not extend the program to "Indian country" because the state did not seek such authority for any sources within the boundaries of Indian reservations.[144] The interim status extends until February 24, 1997, and Colorado must submit the necessary revisions to obtain full approval by August 24, 1996, in order to avoid the implementation of sanctions.[145]

H. Wyoming

Wyoming submitted its statutory[146] and regulatory[147] program for the implementation of Subchapter V to EPA on November 19, 1993.[148] EPA proposed to grant interim approval in two separate notices on September 23, 1994. The first notice was a proposed rulemaking[149] issued for the purpose of granting Wyoming's program interim status, and the second notice[150] was issued for the purpose of granting the program interim status through a direct final rule on the theory that Wyoming's program would be non-controversial[151] This would not be the case, and EPA was compelled to

---

[143] 59 Fed. Reg. 52,124 (1994)

[144] 60 Fed. Reg. 4567 (1995).

[145] *Id.*

[146] *See generally* WYO. STAT. §§35-11-201 to -212 (1977-1995).

[147] WYO. AIR QUALITY STDS. AND REGS. Chap. I, §30 (1994) *cited in* 59 Fed. Reg. 48,803 (1994).

[148] 59 Fed. Reg. 48,803 (1994).

[149] 59 Fed. Reg. 48,802 (1994).

[150] 59 Fed. Reg. 48,845 (1994).

[151] In the final rules section of this Federal Register, the EPA is promulgating interim approval of the Wyoming Operating Permit Program as a direct final rule without prior proposal because the Agency views this submittal as noncontroversial and anticipates no adverse comments.

59 Fed. Reg. 48,845 (1994).

withdraw the direct final rule on November 25, 1994.[152] Final interim approval was granted to this program on January 19, 1995, with an effective date of February 21, 1995, for the program.[153]

EPA noted that Wyoming did not define "prompt" reporting of deviations from permit conditions, but rather left this requirement to be identified in each individual permit. EPA noted that this requirement could be identified in individual permits and that EPA could disapprove permits that did not adequately satisfy the "prompt" reporting of deviations.[154] EPA, in its initial notice cited eight defects in the Wyoming program that would prevent the issuance of full approval to the program, and would require substantial change before full approval could be granted. Among the defects that needed to be cured within the regulation included the status of "Research and Development (*hereafter* R&D)" facilities, which Wyoming deemed to be a separate facility.[155] EPA found this unacceptable and noted that R&D facilities must be "included in major source determinations."[156] EPA cited possible confusion that might exist with respect to the applicable requirements for "insignificant activities" and required that the state regulation be modified to conform with Federal standards.[157] The state regulation needed to be modified to ensure that there would be adequate public participation in the permitting process. EPA found that the Wyoming regulations did not adequately provide for public participation[158] and did not clearly provide for emissions trading as required under applicable Federal regulations.[159]

---

[152] 59 Fed. Reg. 60,561 (1994).

[153] 60 Fed. Reg. 3766 (1995).

[154] 59 Fed. Reg. 48,803 (1994).

[155] (ix) **Research and development activities.** For the purpose of this section, research and development operations shall be considered as separate and discrete stationary sources in determining whether such operations are subject to Section 30 operating permit requirements.

WYO. AIR QUALITY STDS. AND REGS. Chap I, §30(ix) (1995) (Copr (c) 1995 ERM Computer Information Services, Inc.)

[156] 59 Fed. Reg. 48,803 (1994).

[157] 40 C.F.R. §70.5(c) (1994) *cited in* 59 Fed. Reg. 48,803 (1994).

[158] (ii) Application. Sources under this section that would qualify for a general permit must apply to the Division for coverage under the terms of the general permit or must apply for an operating permit consistent with Section 30(c). The

EPA also required several statutory changes before the program could be granted full approval. The first change required by EPA was to clarify that the maximum civil liability that could be assessed would be at least $10,000 per day, as opposed to the $5,000 per day that appeared to be the case in the statutes.[160] The statute needed to be expanded to create strict liability for the imposition of civil penalties in violation of the state statute, as opposed to the existing standard of "willful and knowing" as set forth in the existing statute.[161] Finally, the statutes needed to expand the definition of a violation of tampering with a monitoring device "to include a per day, per violation" penalty, which was not authorized in the Wyoming statutory scheme.[162] Wyoming enacted a law[163] in 1995 that may have made the desired statutory changes, but the regulatory changes appear to be pending. Finally, EPA noted that the state did not submit a definition of "Indian Lands" within the state so that jurisdiction over those lands could be determined.[164]

EPA found that the existing statutory and regulatory scheme was adequate to enforce Section 112 standards, pending the issuance of EPA regulations on the subject. EPA proposed to use Wyoming's preconstruction permitting program as the vehicle to enforce Section 112 within Wyoming on an interim basis, as EPA had proposed to do elsewhere.[165] Wyoming also committed to EPA that it

---

Division may provide for general permit applications which deviate from the requirements of Section 30(c) provided that such applications meet the requirements of title V of the Act and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The Division may issue a general permit without repeating the notice and comment procedures required under Section 30(d)(ix), but such issuance shall not be a final action for purposes of judicial review.

WYO. AIR QUALITY STDS. AND REGS. Chap I, §30(i-ii) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 48,803-48,804 (1994) *and* 60 Fed. Reg. 3770 (1995).

[159] 40 C.F.R. § 70.4(b)(12)(iii) (1994) *cited in* 59 Fed. Reg. 48,804 (1994).

[160] WYO. STAT. §§35-11-901(a), (m), (n) (1977-1995) *cited in* 59 Fed. Reg. 48,803 (1994) *and* 60 Fed. Reg. 3669 (1995).

[161] WYO. STAT. §35-11-901(a) (1977-1995) *cited in* 59 Fed. Reg. 48,803 (1994) *and* 60 Fed. Reg. 3669 (1995).

[162] WYO. STAT. §35-11-901(j) (1977-1995) *cited in* 59 Fed. Reg. 48,803 (1994) *and* 60 Fed. Reg. 3669 (1995).

[163] 1995 Wyo. Sess. Laws 28

[164] 59 Fed. Reg. 48,804 (1994).

[165] 59 Fed. Reg. 48,804-48,805 (1994).

would be able to carry out the provisions of the acid rain program as required.[166] After reviewing the comments submitted by various parties, EPA did not change its original proposal and granted Wyoming interim approval status effective until February 19, 1997. A program must be submitted by August 19, 1996 to cure the defects cited by EPA in order to avoid the implementation of sanctions.[167]

I. Illinois

On September 30, 1994, EPA proposed to grant interim approval to Illinois program.[168] On March 7, 1995, EPA finalized this interim status and the program became effective that same day.[169] The Illinois statutory[170] and regulatory[171] program was submitted to EPA by the Governor on November 15, 1993.[172] The statutory scheme was very detailed, which would leave little room for regulatory changes to make a significant difference, if changes would be required in the Illinois program.

Illinois permit application requirements[173] were inadequate in that there was no requirement that a "responsible official certifying a document to make a 'reasonable inquiry' or that the statement be based upon 'information and belief'"[174] and that this statute would have to be changed. Illinois prescribed its administrative permit amendment requirements in the authorizing statute[175] and this led to

---

[166] 59 Fed. Reg. 48,805 (1994).

[167] 60 Fed. Reg. 3770 (1995).

[168] 59 Fed. Reg. 49,882 (1994).

[169] 60 Fed. Reg. 12,478 (1995).

[170] *See generally* ILL. ANN. STAT. ch. 415, Para. 5/39.5 (Smith-Hurd 1993-1995).

[171] *See generally* ILL. ADMIN. CODE tit. 35, §§270.101-270.609 (1995).

[172] 59 Fed. Reg. 49,882 (1994).

[173] Each submitted CAAPP [Clean Air Act Permit Program] application shall be certified for truth, accuracy, and completeness by a responsible official in accordance with applicable regulations.

ILL. ANN. STAT. ch. 415, Para. 5/39.5(5)(e) (Smith-Hurd 1993-1995) *cited in* 59 Fed. Reg. 49,883 (1994).

[174] 40 C.F.R. §§70.5(d) *and* 70.6(c)(1) (1994) *cited in* 59 Fed. Reg. 49,883 (1994)

[175] ILL. ANN. STAT. ch. 415, Para. 5/39.5(13)(c) (Smith-Hurd 1993-1995).

two interim approval issues. Illinois sought to authorize emissions trading through the mechanism of an administrative permit amendment, which EPA noted was contrary to Federal requirements.[176] Illinois program[177] did not adequately address the requirement that preconstruction permits be used as operating permits and required major changes before this mechanism could be used.[178] Although not an interim approval issue, EPA noted that Illinois did not define "prompt reporting" of deviations from permit conditions specifically in its statute,[179] and that if EPA was not satisfied with the requirements set out in each individual permit, EPA would veto the permit.[180] Finally, EPA required that Illinois regulations dealing with insignificant activities be changed because the proposed thresholds exceeded EPA's desired thresholds for insignificant activities.[181]

---

[176] 40 C.F.R. §70.7(d)(1994) *cited in* 59 Fed. Reg. 49,884 (1994).

[177] ILL. ANN. STAT. ch. 415, Para. 5/39.5(13)(c)(v) (Smith-Hurd 1993-1995) *cited in* 59 Fed. Reg. 49,884 (1994).

[178] For full approval of the State's program, the State would need to develop regulations detailing the actual procedural and compliance requirements necessary for incorporation of preconstruction permits into part 70 permits. These regulations would need to supplement the State's title V submittal or be submitted as a revision to the State's preconstruction permit program state implementation plan.

59 Fed. Reg. 49,884 (1994).

[179] f. To meet the requirements of this subsection with respect to reporting, the permit shall incorporate and identify all applicable reporting requirements and require the following:...

ii. Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken.

ILL. ANN. STAT. ch. 415, Para. 5/39.5(7)(f)(ii) (Smith-Hurd 1993-1995) *cited in* 59 Fed. Reg. 49,884 (1994).

[180] 59 Fed. Reg. 49,884 (1994).

[181] Insignificant activity thresholds which are considered to be acceptable by EPA for Illinois' program would fall in the range of 1-2 tons per year for criteria pollutants and the de minimis levels established under 112(g) or lower for HAPs. These insignificance levels are appropriate for the State's program because of the 25 ton per year major source threshold level established in the State's severe ozone nonattainment areas, and because of the overall major source threshold level for HAPs established at 10 tons per year of one HAP and 25 tons per year of any combination of HAPs. Illinois' insignificant activity regulations establish insignificance levels of no more than 1 lb/hr of any non-HAP (approximately 4 tons per year) and no more than .1 lb/hr of any HAP (approximately .4 tons per year) per emission unit. Because Illinois' insignificant activity regulations fail to comply with EPA's notion of acceptable thresholds, EPA could only propose interim approval for the State's 201 and 211 regulations. If EPA's concerns are addressed in the State's final regulations before final action on this notice, then EPA can fully approve the State's insignificant activities. Alternatively, if the State does not address EPA's concerns before final action on this notice, then EPA's final action will include an interim approval on this issue.

59 Fed. Reg. 49,883 (1994).

With respect to enforcement, EPA required a minor technical change in the Illinois statute to bring its enforcement authority into compliance with Federal requirements.[182] EPA found that the state's charge of $13.50 per ton of allowable emissions in fees was adequate and it used the preconstruction permitting program in existence in Illinois for the purposes of implementing Section 112 on an interim basis pending the issuance of Federal regulations to implement Section 112(g).[183]

The state's permitting program was viewed as adequate to comply with Federal Acid Rain requirements and were approved.[184] However, this changed with the issuance of the final rulemaking by EPA on the Illinois program. The state notified EPA that it would not be able to meet a commitment to implement the Acid Rain program by January 1, 1995.[185] EPA required that the state incorporate by reference the Federal acid rain program into Illinois' statutes before full approval could be granted to the program.[186] EPA did not otherwise alter the required changes in order to obtain full approval for the Illinois program and required Illinois to submit a corrective program by September 9, 1996, or face the imposition of sanctions and the interim status of this program expires March 7, 1997.[187]

---

[182] One issue, however, requires a change in existing State legislation to bring the State's enforcement authority completely in accord with the requirements of part 70. 415 ILCS 5/44(j)(4)(D) of the Illinois Environmental Protection Act prohibits the knowing tampering of any monitoring device or record. 40 CFR 70.11(a)(3)(iii), however, prohibits the knowing tampering of any monitoring device or method. The State must amend its legislative provision to include a prohibition against knowing tampering of a monitoring method. The EPA, therefore, proposes interim approval of the State's program.

59 Fed. Reg. 49,884-49,885 (1994).

[183] 59 Fed. Reg. 49,885 (1994).

[184] *Id.*

[185] 60 Fed. Reg. 12,481-12,482 (1995).

[186] ILL. ANN. STAT. ch. 415, Para. 5/39.5(17) (Smith-Hurd 1993-1995) *cited in* 60 Fed. Reg. 12,481-12,482 (1995).

[187] 60 Fed. Reg. 12,482 (1995).

J. South Dakota

On January 12, 1995,[188] Region 8 proposed to grant interim approval status to the permit program submitted by South Dakota, and went final with this status on March 22, 1995, placing the program in effect on April 21, 1995.[189] The South Dakota legislative[190] and regulatory[191] program met the standards for a federally approved permit program.

Before granting full approval to South Dakota's program EPA required South Dakota to make several changes in its laws and regulations. First, EPA initially contemplated requiring that South Dakota change its law[192] with respect to variances, but decided that this would be wholly inappropriate and concluded that this provision would be viewed as wholly external to the federally approved state program.[193] EPA did require a change in the criminal enforcement statute to raise the maximum penalty to at least $10,000 per day for knowing violations of permits.[194] South Dakota appears to have remedied this problem already by changing its law earlier in 1995.[195]

---

[188] 60 Fed. Reg. 2917 (1995).

[189] 60 Fed. Reg. 15,066 (1995).

[190] *See generally* S.D. CODIFIED LAWS ANN. §§34A-1-1 to -62 (1992-1995).

[191] *See generally* S.D. ADMIN. R. §§74:36:01:01 to :05:50 (1995).

[192] S.D. CODIFIED LAWS ANN. §34A-1-24 (1992-1995) *cited in* 60 Fed. Reg. 2918-2919 (1995).

[193] EPA has no authority to approve provisions of State law, ... which are inconsistent with part 70. EPA does not recognize the ability of a permitting authority to grant relief from the duty to comply with a Federally enforceable part 70 permit, except where such relief is granted through procedures allowed by part 70. EPA reserves the right to enforce the terms of the part 70 permit where the permitting authority purports to grant relief from the duty to comply with a part 70 permit in a manner inconsistent with part 70 procedures.

60 Fed. Reg. 2918-2919 (1995).

[194] 60 Fed. Reg. 2918-2919 (1995).

[195] In addition to any other civil or criminal penalty imposed by this chapter, any person who knowingly violates any applicable requirement, any permit condition, or any fee or filing requirement of this chapter, or who knowingly makes any false material statement, representation, or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method is guilty of a Class 1 misdemeanor and, notwithstanding the maximum penalties provided by § 22-6-2, is subject to a criminal fine in a maximum amount of ten thousand dollars per day per violation.

1995 S.D. LAWS 203 §4, *codified at* S.D. CODIFIED LAWS ANN. §34A-1-62 (1992-1995)

South Dakota's fee structure, which fell below the presumptive minimum was found to be adequate, after making the necessary demonstrations.[196] As with other jurisdictions, EPA noted that the proposed South Dakota regulations and laws were adequate to implement Section 112 and that the preconstruction permitting process would be used to regulate sources of hazardous air pollutants.[197] EPA proposed to grant interim approval to South Dakota over all the territory of the state, except for "Indian Country," even though South Dakota claimed jurisdiction over those areas. EPA deferred making a determination over sources located within "Indian Country" until such time as it issued a supplemental notice on the subject.[198]

After receiving comments, EPA did not change the conditions for full approval of the program and issued a final rulemaking granting the South Dakota program interim status effective April 21, 1995.[199] EPA limited its delegation of Section 112 authority to a period of twelve months following the promulgation of a final EPA rule on the subject, and South Dakota must submit a corrective program no later than October 22, 1996, or face the imposition of sanctions and the interim approval status of this program expires on April 22, 1997.[200]

K. Nevada

EPA issued a proposal for the state program on August 7, 1995, granting the state program interim approval.[201] This proposal was after one local program has been given interim approval and another has been proposed for interim approval. Nevada's authorizing statutes allow local districts to

---

[196] 60 Fed. Reg. 2919 (1995).

[197] 60 Fed. Reg. 2920 (1995).

[198] 60 Fed. Reg. 2920-2921 (1995).

[199] 60 Fed. Reg. 15,066-15,067 (1995).

[200] 60 Fed. Reg. 15,068 (1995).

[201] 60 Fed. Reg. 40,140 (1995).

exercise control over air pollution sources in their respective areas of responsibility.[202] Because of the sequence of EPA actions on programs in Nevada, the operating statutory[203] framework was reviewed on actions in the local programs in order to assess the validity of the local programs.

EPA indicated that nearly a dozen changes[204] would have to be made to the regulations that it considered in proposing approval of this program. In fact, the regulations[205] had been redesignated by Nevada and the citations included in EPA's review of the regulations are by the old system.[206] Nevada is charging $3.36 per ton of regulated pollutant, well be low the presumptive minimum, but EPA was satisfied that this amount, along with an unspecified maintenance fee for each source was adequate to sustain the program as required.[207] With respect to Section 112 implementation, EPA was satisfied that the state's Subchapter V permit program would be adequate to comply with Federal law.[208] Specifically, EPA found that the preconstruction permitting program of the state was adequate to enforce this section on an interim basis pending EPA's issuance of final regulations on the subject.[209]

---

[202] *See* NEV. REV. STAT. ANN. §445.546 (Michie 1991-1995) *cited in* 59 Fed. Reg. 43,523 (1994).

[203] *See generally* NEV. REV. STAT. ANN. §§445.401-.710 (Michie 1991-1995)

[204] 60 Fed. Reg. 40,143-40,144 (1995).

[205] *See generally* NEV. ADMIN. CODE ch. 445B, §§445B.001-.897 (1995).

[206] Therefore, in this proposed interim approval notice, EPA is acting on the following provisions of Nevada State law: NAC 445.430, 445.432, 445.433, 445.4343, 445.4346, 445.438, 445.4395, 445.4415, 445.4425, 445.4615, 445.4625, 445.4635, 445.4645, 445.477, 445.4915, 445.4955, 445.500, 445.5008, 445.504, 445.506, 445.5095, 445.5105, 445.521, 445.5275, 445.5305, 445.5405, 445.5431, 445.548, 445.550, 445.559, 445.5695, 445.571, 445.5855, 445.5905, 445.5915, 445.5925, 445.5935, 445.613, 445.628, 445.630, 445.649, 445.662, 445.664, 445.696, 445.697, 445.699, 445.704, 445.7042, 445.7044, 445.705, 445.7052, 445.7054, 445.7056, 445.7058, 445.706, 445.707, 445.7073, 445.7075, 445.7077, 445.7112, 445.7114, 445.7122, 445.7124, 445.7126, 445.7128, 445.713, 445.7131, 445.7133, 445.7135, 445.7145, 445.7155, 445.717, 445.7191, 445.7193, 445.7195, 445B.221, 445B.327. Provisions not included in the July 12, 1995 letter from NDEP may still be considered supporting documentation for the State's title V operating permit program.

60 Fed. Reg. 40,141 (1995).

[207] 60 Fed. Reg. 40,143 (1995).

[208] *Id.*

[209] 60 Fed. Reg. 40,144 (1995).

Acid rain sources were regulated through the state's incorporation by reference Federal law regarding those sources.[210]

EPA proposed that substantive changes in the regulations be made before full approval could be issued. These proposed changes include requiring that compliance certifications be submitted as part of the permit applications for a source.[211] The Nevada definitions of "regulated air pollutant[s]" must comply with Federal rules.[212] The state must explicitly require that sources which become subject to the permit program after the program's effective date, apply for a permit.[213] The permit shield provisions of the program must be modified to comply with existing Federal rules.[214]

The state's emissions trading provisions must be modified to comply with Federal rules,[215] and the compliance schedules that are to be submitted by all sources must also be modified, and language relating to requirements for the reporting of progress with respect to milestones must be modified.[216] The state regulations must require that any location change for a temporary source be reported to the permitting authority "at least [ten] days in advance of each change in location."[217] The rules must be changed to reflect the requirement that any emissions trading cannot be commenced unless there has been seven days advance notice to the permitting authority.[218] Finally there would have to be a

---

[210] NDEP [Nevada Department of Environmental Protection] incorporated by reference [40 C.F.R.] part 72, the federal acid rain permitting regulations, on February 16, 1995. The incorporation by reference was codified in NAC 445B.221 and submitted to EPA on February 27, 1995 to be added to the State's title V operating permit program.

60 Fed. Reg. 40,143 (1995).

[211] 60 Fed. Reg. 40,143 (1995).

[212] 40 C.F.R. §70.2 (1994) *cited in* 60 Fed. Reg. 40,143 (1995).

[213] 60 Fed. Reg. 40,143 (1995).

[214] *See* 40 C.F.R. §§70.6(f), 70.7(e)(2)(vi) (1994) *cited in* 60 Fed. Reg. 40,143 (1995).

[215] 40 C.F.R. §70.6 (1994) *cited in* 60 Fed. Reg. 40,143 (1995).

[216] 60 Fed. Reg. 40,144 (1995).

[217] *Id.*

[218] *Id.*

clarification for the terms "Major sources" and "insignificant activities."[219] Final action on the state program is still pending.

On August 24, 1994,[220] Region 9 proposed to grant interim approval to the Washoe County, Nevada, Health Department. Washoe submitted its proposed regulations to the state which then forwarded the program to EPA. EPA found that the fees proposed exceeded the presumptive minimum and therefor no fee demonstration was required.[221] EPA accepted Washoe's regulations and commitments as adequate authority to ensure compliance with Section 112 requirements and acid rain regulation.[222]

EPA then set forth the portions of the Washoe regulations which needed revision before the program could obtain full approval. These required revisions included changes in the insignificant activity provisions;[223] the applications for the permits;[224] the public notice provisions for permit evaluation prior to issuance of the regulations;[225] requiring that "certifications must be based on information and belief formed after reasonable inquiry;"[226] requiring compliance schedules be as

---

[219] *Id.*

[220] 59 Fed. Reg. 43,523 (1994).

[221] 59 Fed. Reg. 43,524 (1994).

[222] *Id.*

[223] Specifically, [Washoe Air Pollution Rule] 030.905(B)(3) must state that any activity at a title V facility that is subject to an applicable requirement may not qualify as an insignificant activity. Because Washoe defines insignificant activities by size, both rule 030.020(C)(4) and the application form must require the applicant to list all insignificant activities in enough detail to determine applicability and fees, and to impose any applicable requirements.

59 Fed. Reg. 43,524 (1994).

[224] Revise 030.020 to state that each application must contain the following information: (a) Description of any processes and products associated with alternate scenarios ([40 C.F.R. §]70.5(c)(2)); (b) description of compliance monitoring devices or activities ([40 C.F.R. §]70.5(c)(3)(v)); (c) when emissions trading provisions are requested by a source, proposed replicable procedures and permit terms ([40 C.F.R. §]70.4(b)(12)(iii)); and (d) statement that the source will, in a timely manner, meet all applicable requirements that will become effective during the permit term ([40 C.F.R. §]70.5(c)(8)).

59 Fed. Reg. 43,524 (1994).

[225] Washoe Air Pollution Rule 030.930 (1994) *cited in* 59 Fed. Reg. 43,524 (1994).

[226] 59 Fed. Reg. 43,524 (1994).

stringent as any in a "judicial consent decree or administrative order;"[227] and, requiring that any significant modifications to sources may not operate until a revised permit has been granted.[228]

With respect to the implementation of Section 112(g), EPA proposed to use the preconstruction program as an interim measure pending the adoption of regulations by EPA itself.[229] EPA did not change its posture on the status of this program after receiving comments and issued a final notice granting the Washoe program interim approval effective March 6, 1995,[230] which covers all of Washoe county, except for any Indian Reservations which may be located within the county. The interim approval status extends until February 5, 1997, and Washoe must submit a program revision by August 5, 1996, to avoid the imposition of sanctions.[231]

The only other program in this state that has been the subject of proposed action by EPA is the program for Clark County Health District, Nevada. EPA proposed that this program receive interim approval on March 14, 1995.[232] Clark's fee structure exceeded the presumptive minimum fee, so no fee determination was necessary and the program generally met the requirements of Part 70.[233] In order to obtain full approval, EPA required changes to include submission of documentation with regard to Clark's enforcement of the permit program;[234] regulated source modification;[235] ensuring that Clark's

---

[227] *Id.*

[228] Revise 030.950(E) to ensure that all significant permit modifications, other than those requiring an Authority to Construct, may not be placed into operation until the permitting authority has revised the source's part 70 permit. Washoe's program currently provides this implementation time frame for modifications requiring an Authority to Construct and modifications that are prohibited by an existing permit; however, the time frame must be extended to the remaining universe of significant modifications.

59 Fed. Reg. 43,524 (1994).

[229] 59 Fed. Reg. 43,525 (1994).

[230] 60 Fed. Reg. 1741 (1995).

[231] 60 Fed. Reg. 1743 (1995).

[232] 60 Fed. Reg. 13,683 (1995).

[233] 60 Fed. Reg. 13,684 (1995).

[234] 60 Fed. Reg. 13,685 (1995).

[235] Part 70 prohibits operational flexibility for "modifications under any provision of title I of the Act." In contrast, the District prohibits these changes for any "New Source Review modifications under any provision of title I of the Act,"

regulations complied with the requirement that "'emissions data' may not be considered confidential;"[236] insignificant activities definitions must meet EPA standards;[237] "applicable requirements and National Ambient Air Quality Standards (NAAQS)"[238] must be added for temporary sources; and, early reductions permits must comply with Federal standards.[239]

EPA proposed to use Clark's preconstruction program as an interim measure to implement Section 112(g) pending the issuance of a Federal regulation on the subject.[240] On July 13, 1995, EPA granted final interim approval to this program effective August 14, 1995.[241] In the final rulemaking, EPA did not change any of the criteria for granting full approval to this program. The approval extends to August 13, 1997; does not cover any Indian reservations in Clark County; and, the county must submit proposed corrective actions to EPA no later than February 13, 1997; to avoid the implementation of sanctions.[242]

L. Montana

On February 14, 1995, EPA proposed Montana's permitting program for interim approval.[243] The legislative[244] and regulatory[245] program had been submitted by the state to EPA on March 29,

---

which does not expressly include modifications under sections 111 and 112. EPA expects that most section 111 or 112 modifications will be subject to the District's New Source Review program; however, in certain cases the section 111 or 112 modification definition will be more inclusive than the District's New Source Review rule. Therefore, revising the rule to explicitly prohibit section 502(b)(10) changes for all title I modifications is a requirement for full approval.

60 Fed. Reg. 13,685 (1995).

[236] 40 C.F.R. §2.301 (1994) *cited in* 60 Fed. Reg. 13,685 (1995).

[237] 60 Fed. Reg. 13, 685 (1995).

[238] *Id.*

[239] Early reductions permit deadline. The District must add a deadline of nine months or less for early reductions permits issued under section 112(i)(5) of the Act (40 CFR 70.4(b)(11)).

60 Fed. Reg. 13, 685 (1995).

[240] *Id.*

[241] 60 Fed. Reg. 36,070 (1995).

[242] 60 Fed. Reg. 36,071 (1995).

[243] 60 Fed. Reg. 8335 (1995).

1994,[246] and EPA issued a final rulemaking granting the program interim status on May 11, 1995, with an effective date of June 12, 1995.[247] EPA cited ten issues which required the granting of interim, as opposed to full status for this program.[248] The issues cited in the proposed rulemaking remained the same in the final rulemaking, and were not changed after the comment period.[249] In addition, EPA required several changes in Montana's regulations, or the interpretation of those regulations, prior to the granting of interim approval.[250]

The required changes in the regulations prior to granting interim approval included compelling to eliminate the ability to exempt sources from obtaining a federally enforceable permit by limiting the "source's potential to emit."[251] The state had to clarify the timing of the effectiveness of any permits which may have been appealed with respect to EPA's ability to review a permit prior to becoming effective during EPA's review period of the permit.[252] Clarification was required regarding the ability of the state to "terminate, modify, revoke and reissue permits for cause."[253] Finally, EPA required the state to modify its regulations so that all lessening of "reporting or recordkeeping permit terms" be processed as a major modification.[254]

---

[244] *See generally* MONT. CODE ANN. §§75-2-103 to -413 (1994-1995).

[245] *See generally* MONT. ADMIN. R. 16.8.2001-2025 (1995) *cited in* 60 Fed. Reg. 8336 (1995).

[246] 60 Fed. Reg. 8336 (1995).

[247] 60 Fed. Reg. 25,143 (1995).

[248] 60 Fed. Reg. 8340 (1995).

[249] 60 Fed. Reg. 25,144 (1995).

[250] 60 Fed. Reg. 8337 (1995).

[251] *Id.*

[252] Prior to interim program approval, the State must clarify whether the appeal process on the State's decisions regarding permit issuance, renewal, revision, denial, revocation, reissuance, or termination occurs before or after EPA's 45-day review/approval period. If the appeal process follows EPA's review/approval period, then language must be added to the State's permitting regulation to ensure that permits that are changed after appeal to the board are submitted to EPA for additional review.

60 Fed. Reg. 8337 (1995).

[253] CAA §502(b)(5)(D), 42 U.S.C.A. §7661a(b)(5)(D) (1983-1995) *cited in* 60 Fed. Reg. 8337 (1995).

[254] 60 Fed. Reg. 8337 (1995).

The changes that would have to be made by this program to final approval included altering the definition of an insignificant activity so that a source which generated fifteen tons per year of "any pollutant, other than a hazardous air pollutant listed pursuant to sec. 7412(b) of the FCAA or lead,"[255] would be excluded from consideration as an insignificant activity. EPA then noted what it had accepted in other states for this area and solicited comments on what would be an appropriate level in Montana.[256] Other definitional changes would be required in the program as well. The first of these was the removal of any discretionary authority on the part of the permitting authority in "determining whether or not a change in monitoring or reporting requirements would be as stringent as current monitoring or reporting requirements"[257] as EPA found this discretion was contrary to Federal regulations on the subject.[258] EPA found that the definition of an administrative permit in the Montana regulations authorized the state to usurp the authority of the EPA administrator and compelled an amendment to the regulation to allow EPA involvement in the process.[259] The definition of an

---

[255] MONT. ADMIN. R. 16.8.2002(22)(a)(i) (1995) *cited in* 60 Fed. Reg. 8336 (1995).

[256] For other State title V programs, EPA has proposed to accept, as sufficient for full approval, emission levels for insignificant activities of 2 tons per year of regulated air pollutants and the lesser of 1000 pounds per year, section 112(g) de minimis levels, or other title I significant modification levels for HAPs and other toxics…[citations omitted].

60 Fed. Reg. 8338 (1995).

[257] 60 Fed. Reg. 8337 (1995).

[258] An "administrative permit amendment" is a permit revision that:… Requires more frequent monitoring or reporting by the permittee.

40 C.F.R. §70.7(d)(1)(iii) (1994) *cited in* 60 Fed. Reg. 8337 (1995).

[259] 16.8.2002. Definitions.

As used in this subchapter, unless indicated otherwise, the following definitions apply:

(1) " Administrative permit amendment" means an air quality operating permit revision that:

(a) corrects typographical errors;

(b) identifies a change in the name, address, or phone number of any person identified in the air quality operating permit, or identifies a similar minor administrative change at the source;

(c) requires more frequent monitoring or reporting by the permittee;

(d) requires changes in monitoring or reporting requirements that the department deems to be no less stringent than current monitoring or reporting requirements

(e) allows for a change in ownership or operational control of a source if the department has determined that no other change in the air quality operating permit is necessary, consistent with ARM 16.8.2019; or

"administrative permit" would have to be altered to meet EPA's criteria which would include the requirement that the EPA administrator approve the changes themselves.[260] The preconstruction regulation permit terms had to be changed so that all of the terms of a preconstruction program would be federally enforceable.[261]

The Montana program did not include adequate severability provisions as required in the Federal regulations[262] and these must be added. EPA required clarification of the state's authority to terminate permits, which EPA believed did not exist under the appropriate statutory authority.[263] In addition, EPA required the state to certify that it could use all monitoring data to ascertain compliance. EPA noted that Montana had adopted Federal standards which required performance tests to ascertain compliance.[264]

With respect to Section 112 implementation, the state was required to certify that it had the ability to "make case-by-case MACT determinations"[265] and certify that risk management plans (RMPs) were being properly implemented by regulated sources, or if not, that compliance schedules

---

(f) incorporates any other type of change which the department has determined to be similar to those revisions set forth in (a) - (e), above.

MONT. ADMIN. R. 16.8.2002(1)(f) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 60 Fed. Reg. 8337 (1995).

[260] *Id.*

[261] MONT. ADMIN. R. 16.8.2002(24)(ii) (1995) *cited in* 60 Fed. Reg. 8338 (1995).

[262] Standard permit requirements. Each permit issued under this part shall include the following elements:...

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

40 C.F.R. §70.6(a)(5) (1994) *cited in* 60 Fed. Reg. 8338 (1995).

[263] *See* MONT. CODE ANN. §§75-2-211(1), 217(1) (1994-1995) *cited in* 60 Fed. Reg. 8338 (1995).

[264] the State has incorporated by reference the Federal new source performance standards (NSPS) and national emissions standards for HAPs (NESHAPs) in 40 CFR parts 60 and 61 into its SIP-approved regulations, which provide that compliance can be determined only by performance tests (see 40 CFR 60.11(a) and 40 CFR 61.12(a)).

60 Fed. Reg. 8338 (1995).

[265] 60 Fed. Reg. 8338 (1995).

would be forthcoming for non-compliant sources.[266] Otherwise, EPA proposed to delegate this authority to Montana and found that the preconstruction program and permitting program were adequate to implement Section 112 on an interim basis pending the issuance of EPA regulations on the subject.[267] Montana submitted a fee demonstration where it planned to charge a minimum of $250 per source, with the fees ranging from $2.14 per ton to $8.55 per ton depending on the pollutant in 1995.[268] Finally, as with other states, the approval to regulate sources did not extend to sources located within Indian reservations.[269] Montana must submit a corrective program by December 11, 1996, in order to avoid the commencement of sanctions, and the interim status of this program expires on June 11, 1997.[270]

M. Minnesota

On September 13, 1994, Region 5 proposed to grant interim approval to the Minnesota program.[271] When submitted, the program would be applied to all of Minnesota, excluding Indian Reservations.[272] The Minnesota Pollution Control Agency submitted its operating permit rules[273] which were promulgated by the state under its statutory authority[274] to establish rules regulating pollution in the state. EPA found that the rules were adequate, but noted that Minnesota's definition of "Title I modification" would be consistent with any definition that might ultimately result from any EPA

---

[266] *Id.*

[267] 60 Fed. Reg. 8339 (1995).

[268] 60 Fed. Reg. 8338 (1995).

[269] 60 Fed. Reg. 8340 (1995).

[270] 60 Fed. Reg. 25,145 (1995).

[271] 59 Fed. Reg. 46,948 (1994).

[272] 59 Fed. Reg. 46,948-46,949 (1994).

[273] *See generally* MINN. R. 7007.0050 to .4030 (1995) *cited in* 59 Fed. Reg. 46,948 (1994).

[274] MINN. STAT. ANN. §116.07 (West 1987-1994)

rulemaking on the subject.[275] Minnesota's fee schedule met the minimum presumptive standards and no submission of a fee demonstration was required.[276] EPA proposed to use the preconstruction permitting program contained in the permitting program to implement Section 112 on an interim basis, pending issuance of EPA's regulations on the subject.[277]

In the initial Federal Register notice proposing interim approval of this program, EPA noted six different areas that would required change prior to the issuance of full approval for the program. Five of these proposed changes involved the regulations, and one proposed change was statutory. The sole statutory change that was recommended revolved around a unique defense[278] to criminal prosecution to sources that notify the state of a violation and then act to remedy the violation. Upon issuance of the final rulemaking on this program,[279] reversed its position in reliance on a letter from the Minnesota Attorney General and applicable case law by noting that this defense did not excuse "intentional" violations of the statute as opposed to "knowing" violations of the statute.[280]

---

[275] Title I Modification. 'Title I modification' means any change that constitutes a modification under any provision of title I of the act, including:

A. A new source review modification: major modification as defined in Code of Federal Regulations, title 40, section 52.21(b)(2) or 51.165(a)(1)(v), as amended, or any other rules adopted by the administrator under part C or D of the act.

B. A new source performance standards modification: any modification as defined in Code of Federal Regulations, title 40, section 60.14, as amended, or any other rules adopted by the administrator under section 111 of the act.

C. A hazardous air pollutant modification: any modification as defined in Code of Federal Regulations, title 40, section 61.15, as amended, or any other rules adopted by the administrator under section 112 of the act.

MINN. R. 7007.0100 Subp. 26(A-C) (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 46,949 (1994).

[276] 59 Fed. Reg. 46,949 (1994).

[277] 59 Fed. Reg. 46,949-46,950 (1994).

[278] Subd. 14. Defense. Except for intentional violations, a person is not guilty of a crime for air quality violations under subdivision 6 or 12, or for water quality violations under subdivision 8, if the person notified the pollution control agency of the violation as soon as the person discovered the violation and took steps to promptly remedy the violation.

MINN. STAT. ANN. §609.671(14) (West 1987-1995) *cited in* 59 Fed. Reg. 46,950 (1994).

[279] 60 Fed. Reg. 31,638 (1995).

[280] EPA, relied on two Minnesota cases which construed the phrase "intentional violations." *See* State v. Lindahl 309 N.W.2d 763 (Minn. 1981) *and* State v. Orsello 529 N.W.2d 481, (Minn. Ct. App. 1995) *cited in* 60 Fed. Reg. 31,638 (1995). *In* Orsello, the Court of Appeals stated that: "Statutes that use the term 'intentional to modify a type of behavior make the results of the conduct, rather than the actor's mental state, criminal. To prove a general intent crime, the state

EPA then required several changes to Minnesota's regulations. First, the regulation relating to permit content would have to be altered all part 70 sources would have to submit semi-annual reports,[281] but EPA relented upon final rulemaking and only required annual reporting from those sources which must monitor on an annual basis.[282] Second, EPA required clarity of the administrative procedures set up in the regulations.[283] Permits could not incorporate Federal regulations by reference within the permits themselves,[284] all regulated pollutants would have to be included in fee calculations,[285] and, finally the rules would have to be revised so that actions on minor permit amendments would be finalized no later than ninety days after receipt of a completed application.[286]

In another turn that was unique to Minnesota, EPA also proposed to grant source category limited approval to Minnesota. Minnesota requested such a grant in part because of the possible loss of personnel to industry to deal with the Subchapter V program, the complexity of some of the state's sources and the lack of a preexisting Air Toxics program.[287] Still, EPA observed that the vast majority of Minnesota's sources[288] would become subject to the state permitting program and ultimately granted interim source category limited status as requested by the state.[289] This source category limited

---

must show that the intentional conduct resulted in the outcome proscribed under the statute. In this manner 'intentional' is used to distinguish criminal conduct from the accidental." Orsello 529 N.W.2d 481, 484.

[281] MINN. R. 7007.0800 (1994) *cited in* 59 Fed. Reg. 46,951 (1994).

[282] 60 Fed. Reg. 31,638 (1995).

[283] MINN. R. 7007.1400 (1994) *cited in* 59 Fed. Reg. 46,951 (1994).

[284] MINN. R. 7007.0800 Subpart 16, (1994) *cited in* 59 Fed. Reg. 46,951 (1994).

[285] 59 Fed. Reg. 46,951 (1994).

[286] *Id.*

[287] 59 Fed. Reg. 46,951 (1994).

[288] The EPA believes that a program granted SCL interim approval must apply to at least 60 percent of all part 70 sources, which are responsible for at least 80 percent of the aggregate emissions from all part 70 sources. The EPA requires a demonstration that these criteria are met when a significant percentage of sources or aggregate emissions are excluded from the interim program. The Minnesota submittal which included a schedule for permitting part 70 sources which would permit 60.71 percent of part 70 sources emitting 81.35 percent of aggregate emissions from part 70 sources within 3 years of program approval met the criteria.

59 Fed. Reg. 46,951 (1994).

[289] 60 Fed. Reg. 31,641 (1995).

approval produces the aberrant situation that would excuse the permitting of some sources until the beginning of the next century.[290] The interim approval expires on July 16, 1997, and the state must submit a completed proposal for corrective action no later than January 16, 1997, to avoid the implementation of sanctions.[291]

N. District of Columbia

Although Washington, DC, (hereafter the "District") is not a state of the United States, for purposes of the Clean Air Act, it is considered a state.[292] and must comply with the provisions of Subchapter V. On March 21, 1995,[293] EPA proposed to grant interim approval status to a program submitted by the District on January 13, 1994.[294] The District is empowered to grant permits to air pollution sources by District law[295] and has promulgated regulations to comply with Subchapter V.[296]

While Region 3 found the program eligible for interim approval status, it listed a sizable number of changes required to the District's regulations before full status could be awarded to the program. The District would have to alter its regulations to insure that applications for permits and permit renewals would have compliance plans and adequate provisions for compliance certification;[297]

---

[290] Although the State is required to issue permits within 3 years to all sources subject to the program that obtains interim approval, some sources will not be subject to the requirement to obtain a permit until full approval is granted. Part 70 sources which are not addressed until full approval are also subject to the 3-year time period for processing initial permit applications. The 3-year period for these sources will begin on the date full approval of the State's program is granted. Therefore, initial permitting of all part 70 sources might not be completed until 5 years after interim approval is granted.

60 Fed. Reg. 31,641 (1995).

[291] 60 Fed. Reg. 31,641 (1995).

[292] CAA §302(d), 42 U.S.C.A. §7602(d) (1983-1995).

[293] 60 Fed. Reg. 14,921 (1995).

[294] 60 Fed. Reg. 14,922 (1995).

[295] *See* D.C. CODE ANN. §6-905 to 6-906 (1995).

[296] *See generally* D.C. Mun. Regs. tit. 20, §§301-399 (1994).

[297] 60 Fed. Reg. 14,293 (1995).

require that permit applications cover non-major sources, and demonstrate that the District will not tolerate non-compliance.[298]

In the area of permit content, EPA required changes to clarify that permits to meet "all applicable requirements,"[299] it must revise general permit requirements; clarify provisions relating to operation flexibility and clarify that emissions trading provisions must comply with applicable implementation plans.[300] Several changes were also required in the area of permit issuance, renewal, reopenings and revisions. The District must insure that its program complies with Federally established deadlines;[301] clarify that permits and permit renewals are subject to public participation and state review procedures; clarify when significant permit modification procedures must be used; specify mailings list and public hearing request procedures; and, establish a thirty day notice requirement before any hearing could be conducted.[302] Changes were required in the area of fee determination and EPA required that fees be assessed only on an annual basis.[303] While observing that the enforcement provisions were adequate, EPA still called for substantial changes in the civil and criminal enforcement provisions of the regulations, because the District wasn't clear on where the authority existed within District law or regulation existed for the execution of these provisions.[304] EPA noted that any variances that could be granted would be wholly external to the Part 70 program[305] and found that the District's permit program would be adequate to enforce Section 112 Hazardous Air Pollution standards on an interim basis pending the issuance of EPA regulations on the subject.[306] EPA concluded this

---

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] 40 C.F.R. §70.7 (1994) *cited in* 60 Fed. Reg. 14,923 (1995).

[302] 60 Fed. Reg. 14,923 (1995).

[303] *Id.*

[304] 60 Fed. Reg. 14,923-14,924 (1995).

[305] 60 Fed. Reg. 14,924 (1995).

[306] 60 Fed. Reg. 14,926 (1995).

initial notice by summarizing the twenty-nine changes that would be required to the District's program before full approval could be granted.[307]

On August 7, 1995, Region 3 issued the final rulemaking granting interim approval of this program effective September 6, 1995.[308] EPA found that the permit program that the District had in place would be adequate to implement Section 112(g)[309] pending a final rulemaking on the subject by EPA. The District, in addition to changes identified in the initial notice of proposed rulemaking, must comply with a commitment to EPA to implement an acid rain program no later than November 15, 1995,[310] the District must submit a fully corrected program no later than March 7, 1997, to avoid the imposition of sanctions,[311] and the interim status of this program expires on September 8, 1997.[312]

O. Iowa

On April 26, 1995, Region 7 of EPA proposed to grant interim approval status to the program submitted by the State of Iowa.[313] The regulatory[314] program only required minor changes before full status could be approved and EPA required no changes in the statutes[315] submitted in support of the program. Like many other states before it, Iowa did not seek to exert jurisdiction over sources located on Indian lands within the state.[316]

---

[307] 60 Fed. Reg. 14,926-14,927 (1995).

[308] 60 Fed. Reg. 40,101 (1995).

[309] 60 Fed. Reg. 40,103 (1995).

[310] *Id.*

[311] *Id.*

[312] 60 Fed. Reg. 40,104 (1995) to be codified at 40 C.F.R. Part 70, App. A.

[313] 60 Fed. Reg. 20,465 (1995).

[314] *See generally* IOWA ADMIN. CODE r.567-22.100 to .116 (1994) *cited in* 60 Fed. Reg. 20,466 (1995).

[315] *See generally* IOWA CODE ANN. §§455B.131 to .151 (West 1990-1995) *cited in* 60 Fed. Reg. 20,466 (1995).

[316] 60 Fed. Reg. 220,466 (1995).

One reason for proposing to grant interim approval only to this program was the fact that the state appeared to be uncertain as to how it would manage the program with the number of personnel projected to work for the state. EPA noted that the state would have to demonstrate that the program with the number of personnel projected to be employed could fully execute the program as required, or in the alternative, hire more personnel to support the program.[317] Iowa submitted a fee demonstration to allow it to collect only twenty-four dollars per ton for each regulated pollutant, but the state elected to collect half of this sum pending a determination that the entire amount would be needed.[318]

Regulatory changes would be required[319] to ensure that all sources needing permits would obtain them. EPA required the state to include all sources physically located at a major source to obtain a permit.[320] Iowa would also have to alter its regulations,[321] in order to be consistent with Federal law regarding minor permit modifications,[322] so that the rules explicitly authorize changes

---

[317] Personnel. In its original submission of November 15, 1993, Iowa provided a workload analysis projecting the need for 73 FTE in the state's air bureau, with additional Title V personnel augmenting the program from the local permitting agencies. EPA's analysis of the state's workload verified that this estimate was adequate to successfully implement the operating permit program.

However, in a supplemental letter dated December 6, 1994 (herein referenced as "supplemental letter"), the state described a decision to hire only 10 additional personnel in FY-95, 15 in FY-96, and more personnel in later years. Since the state's air bureau currently has approximately 21 personnel, the current staffing plus modified projections would result in a total of 46 personnel in contrast to the 73 originally projected.

Since modifying the original projection in its supplemental letter, the state has not officially demonstrated to the EPA that a fully adequate number of personnel will be hired to implement the program. The IDNR has presented a proposal to the Environmental Protection Commission to increase the amount of personnel to 61 FTE (instead of 46), although this has not yet been approved or officially submitted to EPA for consideration.

For EPA to propose full approval of the program when the interim period expires, the state must either hire additional personnel to fulfill its original workload analysis or demonstrate that successful implementation of the program may be accomplished with fewer personnel.

60 Fed. Reg. 20,466-20,467 (1995).

[318] 60 Fed. Reg. 20,466 (1995).

[319] *See* IOWA ADMIN. CODE r.567-22.102, -22.103 (1994) *cited in* 60 Fed. Reg. 20,469 (1995).

[320] The state's current regulations exempt sources subject to new source performance standards for new residential wood heaters and the national emission standard for hazardous air pollutants for asbestos demolition/renovation activities, which are located at major sources from being included in permit applications.

60 Fed. Reg. 20,467 (1995).

[321] *See* IOWA ADMIN. CODE r.567-22.110 (1994) *cited in* 60 Fed. Reg. 20,469 (1995).

[322] CAA §502 (b)(10, 42 U.S.C.A. §7661a(b)(10) (1995) *cited in* 60 Fed. Reg. 20,467 (1995).

within a facility that are not modifications, or increase emissions. With respect to permit issuance, Iowa's regulations[323] did not require that all modifications obtain permits prior to commencement of the modification and this would have to be changed. Finally, while Iowa had no program specifically designed to implement Section 112(g), the state had to alter its regulations to ensure that all nonmajor sources that could potentially become subject to this section were fully covered by future standards.[324] Otherwise EPA found that the state had adequate authority in place to implement Section 112, on an interim basis, to take effect if EPA issued appropriate regulations.

On August 4, 1995, EPA proposed approval of Iowa's program[325] for the regulation of "synthetic minor" sources which otherwise might be required to obtain Subchapter V permits. In addition, EPA proposed to delegate authority for the regulation of hazardous air pollutants under Section 112(l) to Iowa, in accordance with the state's request, using this program as a mechanism for enforcing permitting requirements with respect to hazardous air pollutants.

EPA noted that there were four approvability issues for this program before its approval could be included in the state's implementation plan. The definition of a "12 month rolling period" as included in the Iowa regulations was ambiguous and would need to be corrected in accordance with EPA specifications; fugitive emissions would have to be included in this program consistent with provisions dealing with "Prevention of Significant Deterioration;" all Subchapter V sources would have to be excluded from this program; and, all "permit limitations, controls, and requirements" be enforceable.[326] Action on the Subchapter V program, and this Synthetic Minor permitting program, are still pending.

---

[323] *See* IOWA ADMIN. CODE r.567-22.105 (1994) *cited in* 60 Fed. Reg. 20,469 (1995).

[324] *See* IOWA ADMIN. CODE r.567-22.101 (1994) *cited in* 60 Fed. Reg. 20,469 (1995).

[325] *See generally* IOWA ADMIN. CODE r.567-22.200 to .208 (1995) *cited in* 60 Fed. Reg. 39,907 (1995).

[326] 60 Fed. Reg. 39,909 (1995).

P. Indiana

On May 22, 1995, Region 5 proposed interim approval status for the Indian permitting program.[327] Under Indiana's regulatory scheme, the authority to regulate air pollution sources is vested in the state Air Pollution Control Board[328] and regulations have been promulgated to comply with the requirements of Subchapter V. EPA only acted on a portion of the regulations submitted by the state in support of the Subchapter V permit program.[329] EPA found deficiencies in the permit applications that created an interim approval issue which could be remedied before full approval could be granted. EPA required changes in the maximum emission level for SO_2[330] and a lowering in the level of modifications for Hazardous Air Pollutants that could qualify for a minor modification.[331] EPA also required a lowering of the "threshold level for minor permit modification (MPM) group processing eligibility"[332] to a level that complied with Federal rules.[333] Although not an issue for the purposes of determining the interim, or final, approval status of the program, EPA observed that an agreement with the state would be necessary to determine when "prompt" reporting of deviations would be required in the state.[334] Indiana demonstrated that it would be able to comply with the stipulation that the program be

---

[327] 60 Fed. Reg. 20,764 (1995).

[328] *See* IND. CODE ANN. §13-1-1-3 (West 1990-1995).

[329] *See generally* IND. ADMIN. CODE tit. 326, r.2-7-1 to -21 (1995) *cited in* 60 Fed. Reg. 27,065 (1995).

[330] IND. ADMIN. CODE tit. 326, r.2-7-1(20) (1995) *cited in* 60 Fed. Reg. 27,065 (1995).

[331] IND. ADMIN. CODE tit. 326, r.2-1-1(b)(1)(H) (1995) *cited in* 60 Fed. Reg. 27,065 (1995).

[332] IND. ADMIN. CODE tit. 326, r.2-7-12(c)(1)(B) (1995) *cited in* 60 Fed. Reg. 27,065 (1995).

[333] The thresholds for these changes are established through the following method established by the Federal regulation:

(B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (e)(3)(i)(B) (1) and (2) of this section, this threshold shall be 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in §70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:

(1) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that would be imposed by immediate permit modification review, and

(2) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.

40 C.F.R. §70.7(e)(3)(i)(B)(1-2) (1994) *cited in* 60 Fed. Reg. 27,066 (1995).

[334] 60 Fed. Reg. 27,066 (1995).

self-supporting[335] even though some portion of the fees required under the Indiana program were below the presumptive minimum.

EPA reviewed the portion of the Indiana regulations dealing with preconstruction permits[336] for the purpose implementing Section 112 of the act. It found that these provisions were adequate for the purpose of granting interim approval to the Indiana program, when combined with the Subchapter V permit regulations, for implementation of Section 112 pending the issuance of EPA regulations on the subject.[337] Indiana also pledged to accept straight delegation of these standards from EPA when issued.[338] EPA found that Indiana's provisions designed to implement the acid rain program, which incorporated Federal rules, was acceptable.[339] EPA concluded by stating that if the regulations were changed as dictated by EPA, then this program could be granted full approval.[340] Final action is still pending.

Q. North Dakota

On April 28, 1995, EPA proposed interim approval of the program submitted by North Dakota[341] and granted interim approval to that program on July 7, 1995, with an effective date for the program of August 7, 1995.[342] The legislative[343] and regulatory[344] program used by the state was

---

[335] *Id.*

[336] *See generally* IND. ADMIN. CODE tit. 326, r.2-1-1 to -13 (1995) *cited in* 60 Fed. Reg. 27,066-27,067 (1995).

[337] 60 Fed. Reg. 27,067 (1995).

[338] *Id.*

[339] IND. ADMIN. CODE tit. 326, r.21-1-1 (1995) *cited in* 60 Fed. Reg. 27,067 (1995).

[340] *Id.*

[341] 60 Fed. Reg. 20,941 (1995).

[342] 60 Fed. Reg. 35,335 (1995).

[343] Authority for a permit program is found *in* N. D. CENT. CODE §§23-25-01 to -10 (1991-1995)

[344] North Dakota places provisions for its Title V regulations *in* N.D. ADMIN. CODE §§33-15-14-01 to -06 (1995), however, other provisions throughout the Administrative Code will affect the permit program

submitted by the Governor on April 28, 1994. EPA listed eight deficiencies that would cause the program to be proposed for interim status,[345] and these same eight deficiencies were still listed as needing change prior to the program being granted full approval in the final notice of rulemaking.[346]

EPA found that the proposed limitations for insignificant activities were too high and needed to be lowered.[347] The state would be required to alter its regulations and implementation plan so that any use of alternative emissions limits would be in compliance with the state implementation plan.[348] The state regulations did not comply with Federal rules[349] respecting whether changes to a particular source would not exceed authorized emissions for a permitted facility. The North Dakota regulations would have to be modified because they did not explicitly require a facility to be in compliance with its permit operating conditions in order for a permit shield to attach.[350] The regulations made provisions for economic trading incentives, but such provisions were not part of the state implementation plan and therefore could not be part of the program, unless the implementation plan was also changed.[351]

EPA then required several clarifications from the state with respect to the enforceability of the program. The state did not adequately demonstrate that the provisions for judicial review of permits

---

[345] 60 Fed. Reg. 20,933-20,934 (1995)

[346] 60 Fed. Reg. 35,336-35,337 (1995).

[347] N.D. ADMIN. CODE §33-15-14-06.4.c (1995) *cited in* 60 Fed. Reg. 20,943 (1995) *and* 60 Fed. Reg. 35,336 (1995).

[348] N.D. ADMIN. CODE §33-15-14-06.5.a (1995) *cited in* 60 Fed. Reg. 20,943 (1995) *and* 60 Fed. Reg. 35,336 (1995).

[349] Any proposed program would have to demonstrate that any changes would not be modifications and would have to contain "[p]rovisions ...to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in the terms of total emissions): Provided, That the facility provides the Administrator and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different time frame for emergencies. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit.

40 C.F.R. §70.4(b)(12) (1994) *cited in* 60 Fed. Reg. 20,943 (1995).

[350] N.D. ADMIN. CODE §33-15-14-06.5.f.(1) (1995) *cited in* 60 Fed. Reg. 20,943 (1995) *and* 60 Fed. Reg. 35,337 (1995).

[351] 60 Fed. Reg. 20,943 (1995) *and* 60 Fed. Reg. 35,337 (1995).

complied with Federal rules.[352] Likewise, there was an inadequate demonstration that there existed the availability to obtain judicial review of a failure of the state to act on a permit application as required in the Federal rules.[353] EPA also stated that additional clarification was required to determine if the maximum amount of fines that could be assessed was at least "$10,000 per day per violation."[354]

EPA found that North Dakota's fee structure, while well below the minimum presumptive fee, was adequate to support the program.[355] EPA found that this program contained adequate provisions to implement Section 112 through the construction review program,[356] on an interim basis, pending a final rulemaking by EPA on the subject, and that the provisions designed to implement the acid rain program were adequate.[357] EPA excluded coverage of this program from any sources located within the boundaries of any Indian reservations within the state,[358] continued the interim status of the

---

[352] Provide that the opportunity for judicial review described in ...[40 C.F.R. §70.4](b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than 90 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.

40 C.F.R. §70.4 (b)(3(xii) (1994) *cited in* 60 Fed. Reg. 20,944 (1995) *and* 60 Fed. Reg. 35,337 (1995).

[353] State permitting procedures must:

Provide that, solely for the purposes of obtaining judicial review in State court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program. If the State program allows sources to make changes subject to post hoc review (citation omitted)the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State court.

40 C.F.R. §70.4(b)(3)(xi) (1994) *cited in* 60 Fed. Reg. 20,944 (1995) *and* 60 Fed. Reg. 35,337 (1995).

[354] 60 Fed. Reg. 20,944 (1995) *and* 60 Fed. Reg. 35,337 (1995).

[355] N.D. ADMIN. CODE §33-15-14-02 (1995) *cited in* 60 Fed. Reg. 35,337 (1995).

[356] 60 Fed. Reg. 20,944-20,945 (1995).

[357] 60 Fed. Reg. 20,945 (1995).

[358] 60 Fed. Reg. 35,337 (1995).

program until August 7, 1997, while requiring the state to submit corrective actions to EPA for review no later than February 7, 1997.[359]

R. Oklahoma

On March 10, 1995, EPA's Region 6 proposed that the Oklahoma program be granted interim approval.[360] The comment period for this proposed rulemaking was extended on April 26, 1995.[361] Oklahoma requested authority for all of Oklahoma, but made no mention of Indian Country, the proposed interim approval would not cover any portions of Oklahoma located within the boundaries of recognized Indian reservations.[362] With one minor exception, the Oklahoma statutory[363] scheme for enforcement of Subchapter V was found to be adequate. The sole exception, was the ceiling on criminal penalties of $250,000,[364] which, in EPA's opinion was contrary to Federal regulations on the subject that require the lowest maximum penalty available be at least $10,000 per violation per day of

---

[359] *Id.*

[360] 60 Fed. Reg. 13,088 (1995).

[361] 60 Fed. Reg. 20,465 (1995).

[362] 60 Fed. Reg. 13,089 (1995).

[363] *See generally* OKLA. STAT. ANN. tit. 27A, §§2-5-101 to -118 (West 1995).

[364] EPA is concerned about this language in the Oklahoma statute:

B. Any person who knowingly and willfully:

1. Violates any applicable provision of the Oklahoma Clean Air Act or any rule promulgated thereunder, or any order of the Department or any emission limitation or substantive provision or condition of any permit, and who knows at the time that he thereby places another in danger of death or serious bodily injury;

2. Tampers with or renders inaccurate any monitoring device; or

3. Falsifies any monitoring information required to be maintained or submitted to the Department pursuant to the Oklahoma Clean Air Act;

shall, upon conviction, be guilty of a felony and subject to a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00) or for not more than ten (10) years imprisonment, or both such fine and imprisonment.

OKLA. STAT. ANN. tit. 27A, §§2-5-116(B)(1-3) (West 1995) *cited in* 60 Fed. Reg. 13,089 (1995).

violation.[365] EPA required a determination from the state Attorney General that the statute was consistent with Federal law, or be changed to conform.

EPA required several changes in the state's regulations[366] before full approval could be granted. The definition of "major source" and the method of determining an insignificant activity would have to be changed to conform with Federal rules.[367] Permit content, standing to challenge permits, and the Administrative Amendment procedure would have to be changed as well.[368] EPA found that Oklahoma's demonstrated fee of $15.19 per ton of regulated pollutant was adequate, but solicited comments anyway. It required that the acid rain provisions be altered prior to final rulemaking.[369] Oklahoma has since issued a proposed rulemaking that would affect changes in accordance with the EPA required changes.[370]

First, Oklahoma allowed the disaggregation of some sources at oil and gas facilities[371] from group permitting provisions, which would result in the failure to permit some sources as required by Federal regulation.[372] The new definition is virtually identical to the Federal definition.[373] Because of

---

[365] 40 C.F.R. §70.11(a)(3)(ii) (1994) *cited in* 60 Fed. Reg. 13,089 (1995).

[366] *See generally* Okla. Air Quality Council Regulations §§252:100-8-1 to -9 (1995).

[367] 60 Fed. Reg. 13,093 (1995).

[368] 60 Fed. Reg. 13,094 (1995).

[369] *Id.*

[370] Okla. Reg. 4889 (May 15, 1995, Copr. 1995 Inf. for Public Affairs).

[371] Okla. Air Quality Council Regulations §252:100-8-2(4) (1995) *cited in* 60 Fed. Reg. 13,090 (1995).

[372] Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

40 C.F.R. §70.2 (1994) *cited in* 60 Fed. Reg. 13,091 (1995).

[373] " Major Source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in subparagraph (A), (B), (C), or (D), of this definition. For the purposes of defining " major source, " a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources

this problem, Oklahoma requested that it be granted source category limited approval, and EPA required that this request be formalized by Oklahoma in accordance with existing procedures, including necessary regulatory changes, but declared that this would not prevent interim approval status.[374]

With respect to the problems in the areas of insignificant activities, EPA found that Oklahoma's use of a change in the potential to emit based on a percentage of the authorized amount,[375] as opposed to being strictly quantified in terms of "pounds per hour" was unreasonable and could be used as a ruse to hide a source change from "preconstruction review."[376] In addition, any list of insignificant activities would have to be approved by EPA prior to use by sources in Oklahoma.[377]

Oklahoma provided that persons who provided written comments on a permit would have standing in court to challenge a permit, but excluded persons who made oral comments only for permit action proceedings that involved permit applications, renewals, and reopenings;[378] and minor modifications and administrative amendments.[379] These collective deficiencies in the area of public standing to challenge permit actions would have to be altered so that all persons participating in the process would have standing to challenge the action in court.[380]

Two changes would be required in the area of minor permit modifications. First, Oklahoma authorized the use of a minor permit modification to conduct less frequent monitoring than originally

---

on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two digit code) as described in the Standard Industrial Classification Manual, 1987.

Okla. Air Quality Council Regulations §252:100-8-2 (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.)

[374] 60 Fed. Reg. 13,090-13,091 (1995).

[375] Okla. Air Quality Council Regulations §252:100-8-3(e) (1995) *cited in* 60 Fed. Reg. 13,091 (1995).

[376] 60 Fed. Reg. 13,091 (1995).

[377] *Id.*

[378] Okla. Air Quality Council Regulations §252:100-8-7(i)(1)(e) (1995) *cited in* 60 Fed. Reg. 13,091 (1995).

[379] Okla. Air Quality Council Regulations §252:100-8-7(j)(2)(a) (1995) *cited in* 60 Fed. Reg. 13,091 (1995).

[380] 60 Fed. Reg. 13,091 (1995).

contained in a permit.[381] Under the Federal rule,[382] only more frequent monitoring may be authorized using this procedure. Second, the state would have to clarify its use of permit amendments with respect to the New Source Review Program (NSR)[383] and any change in this area would require changes in the state's implementation plan.[384] Additionally, a change in the area of reporting of deviations would be required so that there was a definite time when a deviation from permit conditions would be required from a source to the state.[385] EPA found that the preconstruction permitting process in Oklahoma would be adequate to implement Section 112 standards on an interim basis pending the issuance of EPA rules on the subject and that the acid rain program was adequate.[386] It remains to be seen if the changes in the Oklahoma regulations will be sufficient to satisfy EPA. Action on this program is still pending.

S. Texas

On June 7,1995, EPA Region 6 proposed interim approval of the Texas program.[387] The notice of proposed rulemaking cites the regulatory program in its form prior to September 1, 1993. The state organization responsible for Air Pollution Control changed,[388] and, as a consequence, the

---

[381] Okla. Air Quality Council Regulations §252:100-8-7(d) (1995) *cited in* 60 Fed. Reg. 13,091 (1995).

[382] 40 C.F.R. §70.7(d)(1)(iii) (1994) *cited in* 60 Fed. Reg. 13,091 (1995).

[383] Okla. Air Quality Council Regulations §252:100-8-7(d)(1)(e) (1995) *cited in* 60 Fed. Reg. 13,092 (1995).

[384] 60 Fed. Reg. 13,092 (1995).

[385] Okla. Air Quality Council Regulations §252:100-8-6(a) (1995) *cited in* 60 Fed. Reg. 13,092 (1995).

[386] 60 Fed. Reg. 13,092-13,093 (1995).

[387] 60 Fed. Reg. 30,037 (1995).

[388] The Texas Air Control Board (TACB) was the traditional implementing authority for the Act and all of its amendments. The submittal, including the rules, were adopted by the TACB. The TACB's operations and legal responsibilities were consolidated with operations of other Texas environmental agencies. Therefore, effective September 1, 1993, the Texas Air Control Board became part of a new State of Texas environmental agency, the Texas Natural Resource Conservation Commission (TNRCC). All rules, permits, orders, and any other final actions of the TACB remain in full legal effect unless and until revised by the TNRCC.

60 Fed. Reg. 30,038 (1995).

citations for the Texas rules changed effective September 1, 1993.[389] The Texas Clean Air Act[390] is the statutory scheme for regulating air pollution in Texas.

EPA found several changes would be necessary in order to grant the program full compliance, but stated that any commentary is subject to pending litigation about the existing Federal rules.[391] The Texas regulations[392] were drafted in such a manner as to exclude some minor New Source Review (NSR) sources from permitting requirements.[393] Texas argued that its existing program was very stringent and that no change was necessary. Regulations dealing with permit applications,[394] permit revisions,[395] and, permit content[396] would have to be altered to comply with Federal rules. EPA then issued the conditions under which it would grant interim approval.[397] EPA found fault with the criteria used by Texas to define covered sources[398] under this program and ordered a change so that the Texas rule was consistent with Federal rules.[399] In addition, Texas sought to treat Research and Development (R&D) facilities as a separate "site"[400] and this was found to be unacceptable by EPA. All sources in a

---

[389] [T]he Texas Register is creating a new title in the Texas Administrative Code, Title 30. Environmental Quality and is administratively transferring all rules from TWC and TACB to Title 30, Part I. Texas Natural Resource Conservation Commission laterally, effective September 1, 1993.

18 Tex. Reg. 5840 (1993).

[390] *See generally* TEX. HEALTH & SAFETY CODE ANN. §§382.001 to .141 (West 1992-1995).

[391] 60 Fed. Reg. 30,038-30,039 (1995).

[392] TEX. ADMIN. CODE tit. 30, §122.010 (1995) *cited in* 60 Fed. Reg. 30,039 (1995).

[393] 60 Fed. Reg. 30,039 (1995).

[394] TEX. ADMIN. CODE tit. 30, §§122.130 to .139 (1995) *cited in* 60 Fed. Reg. 30,039 (1995).

[395] TEX. ADMIN. CODE tit. 30, §§122.210 to .221 (1995) *cited in* 60 Fed. Reg. 30,039 (1995).

[396] TEX. ADMIN. CODE tit. 30, §§122.141-122.145 (1995) *cited in* 60 Fed. Reg. 30,039 (1995).

[397] (1) Include a statement in permits that certain minor NSR requirements are not included in permits issued during the interim period; (2) include a cross- reference in each operating permit to the minor NSR permit for that source; and (3) require reopening of permits for incorporation of minor NSR permit conditions upon completion of the interim approval period. ... [I]t is the EPA's position that the Texas program can be granted interim authorization as long as the State complies with the three conditions discussed above.

60 Fed. Reg. 30,039 (1995).

[398] TEX. ADMIN. CODE tit. 30, §122.120(4) (1995) *cited in* 60 Fed. Reg. 30,040 (1995).

[399] 40 C.F.R. §70.3(a) (1994) *cited in* 60 Fed. Reg. 30,040 (1995).

[400] 60 Fed. Reg. 30,040 (1995).

covered area must be permitted, including fugitive emissions from covered sources.[401] EPA noted that this problem was created by the preamble of the final rulemaking on the Federal regulations.[402]

EPA faulted some of the definitions cited in the Texas regulations. Texas limited its definitions of a "major source" to fugitive emissions sources regulated by Federal law on August 7, 1980.[403] EPA noted that all sources subject to Federal law must be regulated, not just those as of August 7, 1980.[404] EPA was not satisfied with Texas' definition of a "Title I modification"[405] and noted that this definition excluded some sources that would have to be covered under the law as it existed prior to the 1990 amendments. EPA still required a change to cover all the sources not-with-standing the fact that EPA still hadn't determined the appropriate Federal posture in this area.[406]

EPA required that Texas insure that all sources out of compliance and that would be obtaining permits have compliance schedules that are "at least as stringent as any consent decree or administrative order to which the source is subject."[407] EPA articulated the position that the Texas rule did not meet this standard.[408] The application permit shield in the Texas regulations was unlawfully

---

[401] *Id.*

[402] *Id.*

[403] TEX. ADMIN. CODE tit. 30, §122.010 (1995) *cited in* 60 Fed. Reg. 30,041 (1995).

[404] 40 C.F.R. §70.2 (1994) *cited in* 60 Fed. Reg. 30,041 (1995).

[405] Title I modification--Changes at a site that qualify as a modification under Title I of the Act, §111 (New Source Performance Standards) or Title I of the Act, §112(g), or as a major modification under Part C (Prevention of Significant Deterioration) or Part D (Nonattainment Review) of Title I of the Act.

TEX. ADMIN. CODE tit. 30, §122.010 (1995) (Copr. (C) West, 1995) *cited in* 60 Fed. Reg. 30,041 (1995).

[406] The State's definition of 'title I modification' does not include changes reviewed under a minor source preconstruction review program ('minor NSR changes'), nor does it include changes that trigger the application of National Emission Standards for Hazardous Air Pollutants (NESHAP) established pursuant to section 112 of the Act prior to the 1990 Amendments. The EPA is currently in the process of determining the appropriate interpretation of 'title I modification'.

60 Fed. Reg. 30,041 (1995).

[407] 60 Fed. Reg. 30,041 (1995).

[408] (b) Each federal operating permit application shall include a compliance plan. Such plan shall contain the following:

(3) for those relevant emissions units not in compliance with applicable requirements:

(B) a compliance schedule containing a schedule of remedial measures, including, but not limited to, an enforceable sequence of actions;

extended to permit modification applications.[409] The overall rules for minor permit modifications would have to be changed to comply with Federal regulations, including EPA objection periods, and permit changes after preconstruction authorization.[410] The Texas regulations[411] did not authorize public participation in all permit modifications, and this would have to be changed to comply with the Federal rule.[412]

Permit terms also required several changes before the permits terms and conditions could be granted federal approval. Permits would have to cover all emissions, including fugitive emissions, from covered sources, and resolution of this issue was directly tied to the successful resolution of the "Title I modification" definitional issue.[413] The permit term would have to be definitively stated to be for a period of no more than five years.[414] While Texas had no "permit shield" within its regulations, Texas made provisions for enforcement protection,[415] but required certain assurances concerning the implementation of this provision[416] pending interim approval, and required a codification of the

---

TEX. ADMIN. CODE tit. 30, §122.132(b)(3)(B) (1995) (Copr. (C) West 1995) *cited in* 60 Fed. Reg. 30,041 (1995).

[409] TEX. ADMIN. CODE tit. 30, §122.138 (1995) *cited in* 60 Fed. Reg. 30,041 (1995).

[410] TEX. ADMIN. CODE tit. 30, §§122.215 to -.217 (1995) *cited in* 60 Fed. Reg. 30,042 (1995).

[411] TEX. ADMIN. CODE tit. 30, §122.153 *and* TEX. ADMIN. CODE tit. 30, §122.202(a) (1995) *cited in* 60 Fed. Reg. 30,042 (1995).

[412] 40 C.F.R. §70.7(h) (1994) *cited in* 60 Fed. Reg. 30,042 (1995).

[413] 60 Fed. Reg. 30,043 (1995).

[414] *Id.*

[415] (e) At the discretion of the TACB and based upon a request and sufficient demonstration by the applicant, a federal operating permit may establish certain interpretations of specific language and definition of specific terms in an applicable requirement. These interpretations by the TACB, for the purpose of determining compliance with the specific applicable requirement, shall not be modified by the TACB until notification is provided to the permittee. Within 90 days of notification of a change in interpretation by the TACB, the permittee shall apply for the appropriate permit revision to reflect the new interpretation of the applicable requirement.

TEX. ADMIN. CODE tit. 30, §§122.145(e) (1995) (Copr. (C) West, 1995) *cited in* 60 Fed. Reg. 30,043 (1995).

[416] Therefore, the EPA believes it can not go forward with a final action granting interim approval to the State of Texas unless the EPA receives a written commitment from the board of the TNRCC or designee agreeing to process any actions taken pursuant to section 122.145(e) as follows: (1) The interpretation made pursuant to section 122.145(e) shall be limited to applicability issues only; (2) the EPA shall have the opportunity to review and veto every section 122.145(e) action; and (3) the interpretation will be based upon the most current EPA guidance, and any guidance developed by the TNRCC must be in writing and preapproved by the EPA.

60 Fed. Reg. 30,043 (1995).

assurances before final approval could be granted. The state's regulations permitted notification of an emergency or upset to the state authorities be made no later than two weeks after such an event,[417] which is contrary to the Federal rule[418] requiring such notifications within two days of the event, and EPA required this be changed prior to full approval.

While Texas was preparing to charge the presumptive minimum fees, EPA withheld judgment on whether this would be adequate because the state did not have a four year projection of costs.[419] The Texas permit program was deemed adequate for the implementation of the Section 112 and, of course, EPA added its usual caution that final rules on this subject were still pending. Texas incorporated by reference provisions to implement the Acid Rain program.[420] Finally, Texas included in its submission a schedule of sources that would be permitted so that sixty percent of the sources would be permitted within the first three years of interim approval. EPA approved of Texas proposed schedule as being adequate to comply with Federal requirements.[421] Final action on this program is still pending.

T. Tennessee

The only action that has been taken with respect to jurisdictions in Tennessee was the full approval of the program for Davidson County and Nashville, Tennessee, which regulated perchloroethylene emissions from dry cleaners under Section 112.[422] As of July 1, 1995, EPA has not published any other proposed or final rulemakings for any programs in this state.

---

[417] TEX. ADMIN. CODE tit. 30, §122.143 (1994) *cited in* 60 Fed. Reg. 30,043 (1995).

[418] 40 C.F.R. §70.6(g)(3) (1994) *cited in* 60 Fed. Reg. 30,044 (1995).

[419] 60 Fed. Reg. 30,044 (1995).

[420] *Id.*

[421] *Id.*

[422] 60 Fed. Reg. 11,029 (1995).

U. Florida

On June 21, 1995, EPA proposed to grant interim approval status to the program of statutes[423] and regulations[424] submitted by the state of Florida on November 16, 1993, and supplemented three times during 1994.[425] Florida was not required to make any changes prior to final rulemaking in order to obtain interim approval of the program. EPA identified several changes that would be required in the regulations, thus raising the possibility that this program could be fully approved sooner rather than later.

First among these changes was the definition of a "major source,"[426] which potentially excluded criteria pollutant "emissions of criteria pollutants from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station will not be aggregated with emissions of criteria pollutants from other similar units"[427] and found that this exclusion was contrary to Federal rules.[428] Second, the rules[429] had to be changed to allow that permit applications had to be changed so that applications for renewals could be filed in time to have the renewal acted upon before the original permit expired.[430]

EPA noted that several changes would be required to the Florida rules[431] in order to bring the threshold levels for determining what a major source would be into line with Federal regulations,

---

[423] *See generally* FLA. STAT. ANN. §§403.087 to .0877 (West 1993-1995)

[424] *See generally* FLA. ADMIN. CODE ANN. r. 62-213.100 to .900 (1995) *cited in* 60 Fed. Reg. 32,293 (1995).

[425] 60 Fed. Reg. 32,293 (1995).

[426] FLA. ADMIN. CODE ANN. r. 62-213.200(19)(a) (1995) *cited in* 60 Fed. Reg. 32,294 (1995).

[427] 60 Fed. Reg. 32,294 (1995).

[428] *Id.*

[429] FLA. ADMIN. CODE ANN. r. 62-4.090 (1995) *cited in* 60 Fed. Reg. 32,294 (1995).

[430] 60 Fed. Reg. 32,294 (1995).

[431] FLA. ADMIN. CODE ANN. r. 62-13.200(3) (1995) *cited in* 60 Fed. Reg. 32,294 (1995).

particularly with respect to insignificant activities.[432] EPA required the removal of exemptions for some oil fired generating units; perchloroethylene dry cleaning units; back up electrical generators; and phosphogypsum stacks[433] prior to full approval. Florida's rules[434] allowed for the determination of "insignificant activities" on an individual basis, which EPA required to change for full approval and included specific levels that it would find acceptable.[435]

As with other states, Florida intends to define "prompt reporting" of permit deviations in each permit, and EPA noted that it would be ever vigilant and exercise a permit veto if appropriate.[436] EPA was generally satisfied with the remainder of the regulations dealing with permit processing, however, it noted that there was no provision for reopenings of permits for cause consistent with Federal rules[437]

---

[432] As a condition of full approval, the State must revise Rule 62-210.300(3), F.A.C. to provide that (1) no insignificant activities or emissions units subject to applicable requirements (as defined in Rule 62-213.200(6), F.A.C.) will be exempted from title V permitting requirements; (2) insignificant activities or emissions units exemptions will not be used to lower the potential to emit below major source thresholds; and (3) emissions thresholds for individual activities or units that are exempted will not exceed five tons per year for criteria pollutants, and the lesser of 1000 pounds per year or section 112(g) de minimis levels for HAPs.

60 Fed. Reg. 32,294-32,295 (1995).

[433] FLA. ADMIN. CODE ANN. r. 62-13.200(3) (1995) *cited in* 60 Fed. Reg. 32,295 (1995).

[434] (1) The following installations are exempted from the permit requirements of this Chapter. The following exemptions do not relieve any installation from any other requirements of Chapter 403., F. S., or rules of the Department. Other installations may be exempted under other chapters of Title 17.... (b) Any existing or proposed installation which the Department shall determine does not or will not cause the issuance of air or water contaminants in sufficient quantity, with respect to its character, quality or content, and the circumstances surrounding its location, use and operation, as to contribute significantly to the pollution problems within the State, so that the regulation thereof is not reasonably justified. Such a determination is agency action and is subject to Chapter 120, F. S. Such determination shall be made in writing and filed by the Department as a public record. Such determination may be revoked if the installation is substantially modified or the basis for the exemption is determined to be materially incorrect.

FLA. ADMIN. CODE ANN. r. 62-4.040(1)(b) (1995) (Copr. (C) West 1995) *cited in* 60 Fed. Reg. 32,295 (1995).

[435] (1) no insignificant activities or emissions units subject to applicable requirements ... will be exempted from title V permitting requirements; (2) no insignificant activities or emissions units exemptions will be used to lower the potential to emit below major source thresholds; and (3) emissions thresholds for individual activities or units that are exempted will not exceed five tons per year for criteria pollutants, and the lesser of 1000 pounds per year or section 112(g) de minimis levels for HAPs.

60 Fed. Reg. 32,295 (1995).

[436] 60 Fed. Reg. 32,295 (1995).

[437] 40 C.F.R. §70.7 (f)(1) (1994) *cited in* 60 Fed. Reg. 32,295 (1995).

and required three changes[438] to Florida's regulations which would allow it to comply with the Federal rule in order to obtain full approval for the program.

Florida's fee was below the presumptive minimum so a fee demonstration was submitted which met EPA's approval. Florida's preconstruction program[439] was proposed for use as the vehicle for implementing Section 112(g) on an interim basis, and Florida elected to accept straight delegation of hazardous air pollution standards.[440] Florida has also committed to implement the acid rain provisions of the act.[441] Finally, EPA noted that this program would only apply to portions of the state of Florida that were outside Federally recognized Indian reservations.[442] Final action on this program is still pending.

V. Arizona

On July 13, 1995, Region 9 of EPA proposed approval for all of the programs submitted by the state of Arizona for the state and three local agencies.[443] In order to have programs on both the state and local levels, Arizona has a separate statutory scheme to establish both the state[444] and local[445]

---

[438] (1) if a permit is reopened and revised because additional applicable requirements become applicable to a major source with a remaining permit term of 3 or more years, such a reopening shall be completed within 18 months after promulgation of the applicable requirement; (2) a permit shall be reopened and revised if EPA or the State determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit; and (3) a permit shall be reopened if EPA or the State determine that the permit must be revised or revoked to assure compliance with the applicable requirements.

60 Fed. Reg. 32,295-32,296 (1995).

[439] *See generally* FLA. ADMIN. CODE ANN. r. 62-212.100 to .700 (1995) *cited in* 60 Fed. Reg. 32,296 (1995).

[440] 60 Fed. Reg. 32,297 (1995).

[441] *Id.*

[442] *Id.*

[443] The programs were styled as follows by EPA for purposes of reference throughout the notice of proposed rulemaking: "Arizona Department of Environmental Quality (ADEQ), the Maricopa County Environmental Services Department, (Maricopa), the Pima County Department of Environmental Quality (Pima), and the Pinal County Air Quality Control District (Pinal)[.]"

60 Fed. Reg. 36,083 (1995).

[444] *See generally* ARIZ. REV. STAT. ANN. §§49-421 to -467 (1988-1995).

programs. The state[445] and all local rules[447] were deemed sufficient to meet the standards for interim approval. One unique provision of Arizona law requires that the state and local programs have identical regulations for the permitting of sources based on the state version, any changes required in the state regulations would also have to apply to the local regulations.[448] EPA only approved those portions of the regulations issued by each agency that authorized permits under Subchapter V.[449]

The first fault found with the regulations was in the area of "start up/shut down" defenses. EPA found that the Arizona rule[450] was contrary to Federal provisions authorizing a permit shield[451]

---

[445] *See generally* ARIZ. REV. STAT. ANN. §§49-471 to -516 (1988-1995).

[446] *See generally* ARIZ. COMP. ADMIN. R. & REGS. 18-2-101--18-2-511 (1995) *cited in* 60 Fed. Reg. 36,084 (1995).

[447] Maricopa's title V regulations, adopted or revised on November 15, 1993, include Rules 100, 110, and 120 of Regulation I; Rule 200, except sections 305, 306, 407, and 408, Rules 210, 230, and 280 of Regulation II; Rule 370 of Regulation III; Rule 400 of Regulation IV; and Appendix B of the Maricopa Air Pollution Control Regulations (MAPC Regulations). Pima's title V regulations, adopted or revised on September 28, 1993 include Chapter 17.04; Chapter 17.12, except sections 17.12.030, 040, 050, 060, 070, 360, Article IV, and Article V; Article IX of Chapter 17.16; Chapter 17.20; Chapter 17.24; and Chapter 17.28 of Title 17 of the Pima County Code (PCC). Pinal's title V regulations adopted or revised on November 3, 1993 include Article 3 of Chapter 1; Articles 1, 2, 4, 5, 6, and 7 of Chapter 3; Article 1 of Chapter 7; Article 1 of Chapter 8; Article 1, Sections 9-1-070 and 9-1-080 of Chapter 9; and Appendix A of the Pinal County Code of Regulations (PCR).

60 Fed. Reg. 36,084 (1995).

[448] Procedures for the review, issuance, revision and administration of permits issued pursuant to this section and required to be obtained pursuant to title V of the clean air act including sources that emit hazardous air pollutants shall be identical to procedures for the review, issuance, revision and administration of permits issued by the department under this chapter.

ARIZ. REV. STAT. ANN. §49-480(B) (1988-1995) (Copr. (C) West 1995) *cited in* 60 Fed. Reg. 36,084 (1995).

[449] 60 Fed. Reg. 36,084 (1995).

[450] A. Emissions in excess of an applicable emission limitation contained in this Chapter or in the terms of a permit shall constitute a violation. For all situations that constitute an emergency as defined in R18-2-306(E), the affirmative defense and reporting requirements contained in that provision shall apply. In all other circumstances, it shall be an affirmative defense if the owner or operator of the source has complied with the reporting requirements of subsection (C) of this Section in a timely manner and has demonstrated all of the following:

1. The excess emissions resulted from a sudden and unavoidable breakdown of the process or the control equipment, resulted from unavoidable conditions during startup or shutdown, resulted from unavoidable conditions during an upset of operations, or that greater or more extended excess emissions would result unless scheduled maintenance is performed;

2. The air pollution control equipment, process equipment, or processes were at all times maintained and operated in a manner consistent with good practice for minimizing emissions;

3. Where repairs were required, such repairs were made in an expeditious fashion when the applicable emission limitations were being exceeded and off-shift labor and overtime were utilized where practical to insure that such repairs were made as expeditiously as possible. If offshift labor and overtime were not utilized, the owner or operator satisfactorily demonstrated that such measures were impractical;

4. The amount and duration of the excess emissions (including any bypass operation) were minimized to the maximum extent practicable during periods of such emissions;

and required that this provision only be applied to permits issued by the state outside the provisions of Subchapter V.[452] In addition, fugitive emissions would have to be considered when determining that a source is "major" under the Hazardous Air Pollution laws.[453]

The next problem existed in the area of insignificant activities. EPA found the state regulation[454] allowed the state unfettered discretion to determine an "insignificant activity" without approval of EPA, and required such EPA input prior to full approval.[455] With respect to the local programs, the insignificant activities problems presented different issues. EPA required Maricopa County to provide a listing of how it concluded what insignificant activities were and whether or not they would be subject to an "applicable requirement."[456] Both Pima and Pinal utilized definitions for insignificant activities that would exceed EPA's desired goals in this area, but EPA solicited comment on the appropriateness of the levels used in these programs and others before a final rule is issued for these programs.[457]

---

5. All feasible steps were taken to minimize the impact of the excess emissions on potential violations of ambient air quality standards;

6. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and,

7. During the period of excess emissions there were no measured violations of the ambient air quality standards established in Article 2 of this Chapter which could be attributed to the emitting source.

ARIZ. COMP. ADMIN. R. & REGS. 18-2-310(A)(1-7) (1995) (Copr. (C) West 1995) *cited in* 60 Fed. Reg. 36,084 (1995).

[451] 40 C.F.R. §70.6 (1994) *cited in* 60 Fed. Reg. 36,084 (1995).

[452] 60 Fed. Reg. 36,084 (1995).

[453] 60 Fed. Reg. 36,088 (1995).

[454] j. Any other activity which the Director determines is not necessary, because of its emissions due to size or production rate, to be included in an application in order to determine all applicable requirements and to calculate any fee under this Chapter.

ARIZ. COMP. ADMIN. R. & REGS. 18-2-101(54)(j) (1995) (Copr. (C) West 1995) *cited in* 60 Fed. Reg. 36,084 (1995).

[455] 60 Fed. Reg. 36,084 (1995).

[456] 60 Fed. Reg. 36,084-36,085 (1995).

[457] 60 Fed. Reg. 36,085 (1995).

Arizona must include application deadlines for sources subject to permit requirements within twelve months of when the source becomes a major source.[458] Revisions were required for the trading emissions provisions to be consistent with the state's implementation plan, and these changes must not be modifications.[459] The Arizona rules[460] must be modified to maintain the effectiveness of permits where a renewal application has been filed and not acted upon by the state. Importantly, EPA required that a "material permit condition"[461] be modified extensively[462] to permit prosecution of violations that might otherwise be excused by affirmative defenses provided for in the Arizona code.[463] Additionally, Arizona was required to add the failure to comply with fee and filing requirements as a "Material permit condition," effectively negating a provision of the Arizona code[464] that limited enforcement of criminal sanctions to violations of "fee and filing requirements due to criminal negligence only."[465] Public notice provisions would also have to be altered to comply with Federal rules.[466]

---

[458] ARIZ. COMP. ADMIN. R. & REGS. 18-2-304(C) (1995) *cited in* 60 Fed. Reg. 36,088 (1995).

[459] 60 Fed. Reg. 36,088 (1995).

[460] ARIZ. COMP. ADMIN. R. & REGS. 18-2-322 (1995) *cited in* 60 Fed. Reg. 36,089 (1995).

[461] ARIZ. COMP. ADMIN. R. & REGS. 18-2-331 (1995) *cited in* 60 Fed. Reg. 36,089 (1995).

[462] (a) Revise R18-2-331(A)(1) to provide that "the condition is in a permit or permit revision issued by the Director or the Control Officer after the effective date of this Section."
(b) Delete the requirement in R18-2-331(A)(2) that the condition must be identified within the permit as a material permit condition.
(c) Revise R18-2-331(A)(3)(c) to provide that a material permit condition includes a "requirement for the installation, operation, maintenance, or certification of a monitoring device."
(d) Revise R18-2-331(A)(3)(e) to provide that a material permit condition includes a "requirement for the operation or maintenance of air pollution control equipment."
(e) Revise R18-2-331(A)(3) to include the following:
i. A requirement for or prohibition on the use of a particular fuel or fuels, including a requirement for fuel consumption;
ii. A requirement to meet an operational limit, including, but not limited to, hours of operation, throughput, production rates, or limits or specifications for raw materials;
iii. A requirement to comply with a work practice standard that is intended to reduce emissions (e.g., covering solvents, wetting unpaved roads).

60 Fed. Reg. 36,089 (1995).

[463] ARIZ. REV. STAT. ANN. §49-464(Q), -514(P) (1988-1995) *cited in* 60 Fed. Reg. 36,089 (1995).

[464] ARIZ. REV. STAT. ANN. §49-464(L)(3) (1988-1995) *cited in* 60 Fed. Reg. 36,089 (1995).

[465] 60 Fed. Reg. 36,089 (1995).

[466] 40 C.F.R. §70.7 (1994) *cited in* 60 Fed. Reg. 36,089 (1995).

EPA required similar changes in the local regulations submitted for the Maricopa County Air Pollution Control District,[467] Pima County Development Authority,[468] and Pinal County Air Quality Control District.[469] With respect to Section 112(g) implementation, EPA found that the existing regulations and statutes were sufficient to implement this section. Pima and Pinal required that all sources subject to a requirement under this provision obtain a permit, while the state and Maricopa did not have such a requirement, electing only to require Major sources to obtain a permit.[470] Each agency pledged to execute an agreement with EPA to accept straight delegation of standards.[471]

While EPA noted that the application from Arizona did not cover Indian lands located within the state,[472] Arizona has a statute that purports to exert jurisdiction over all lands within the state for the purpose of enforcing the air pollution control laws.[473] Federal law allows the states to exert jurisdiction over certain civil and criminal matters, within the Indian reservations located within those

---

[467] 60 Fed. Reg. 36,089-36,090 (1995).

[468] 60 Fed. Reg. 36,090-36,091 (1995).

[469] 60 Fed. Reg. 36,091-36,092 (1995).

[470] 60 Fed. Reg. 36,092 (1995).

[471] *Id.*

[472] 60 Fed. Reg. 36,083 (1995).

[473] ARIZ. REV. STAT. ANN. §49-561 (1988-1995).

states.[474] This subject will be dealt with more thoroughly later in this paper.[475] Action on this program is still pending.

[474] *See* 18 U.S.C.A. §1162 (1984-1995) *and* 28 U.S.C.A. §1360 (1983-1995) *cited in* ARIZ. REV. STAT. ANN. §49-561 (1988-1995).

[475] *See infra* part VII.A.

V

California Subchapter V Permit Programs

A. Statutory Authority and Statewide Issues

Under California law, primary responsibility for the enforcement of air pollution control laws, except for those relating to motor vehicles, are vested in local districts.[1] Because of this authority, the local districts are required to implement the provisions of both state and Federal law in the area of air pollution control from stationary sources.[2] California provides for the existence of the California Air Resources Board (*hereinafter* known by the acronym CARB)[3] which has overall responsibility for the enforcement of Federal and state standards in this area, and has an obligation to provide permit assistance to the local districts.[4] There are specific provisions for dealing with toxic air contaminants,[5] and the state has primary responsibility for conducting research in this area.

The state has statutorily created several types of districts. Authority exists for unified air pollution districts,[6] and regional air pollution control districts,[7] which may consist of areas that exceed more than one county. There is also general authority for the power of air pollution control districts to regulate virtually every aspect of life with the exception of motor vehicles in their respective areas of

---

[1] CAL. HEALTH & SAFETY CODE §40000 (West 1986-1995).

[2] CAL. HEALTH & SAFETY CODE §40001(a) (West 1986-1995).

[3] CAL. HEALTH & SAFETY CODE §39510 (West 1986-1995).

[4] CAL. HEALTH & SAFETY CODE §39620 (West 1986-1995).

[5] CAL. HEALTH & SAFETY CODE §§39650-39669 (West 1986-1995).

[6] CAL. HEALTH & SAFETY CODE §§40150-40162 (West 1986-1995).

[7] CAL. HEALTH & SAFETY CODE §§40300-40392 (West 1986-1995).

responsibility.[8] The criminal and civil enforcement provisions required under Federal rules[9] are also provided for in state law.[10]

The state has also created several regional districts in the larger urban areas of the state. These regional districts have their own statutory basis and their respective powers, duties and responsibilities are listed in the organic statutes for each specific region. The Bay Area Air Quality Management District (*hereinafter* known as BAAQMD) was created to regulate sources in the San Francisco area.[11] The Los Angeles area comprises the South Coast Air Quality Management District[12] (*hereinafter* known as "South Coast"). The Sacramento[13] and Mojave Desert[14] regions also have their own specially created air pollution districts.

Because of the way in which California has elected to enforce air pollution laws for nonvehicular sources, EPA's Region 9 has issued several proposed and final rulemakings affect the various portions of the state. California has excluded agricultural sources from the Subchapter V program,[15] which has resulted in analysis of these program only with respect to the granting of Source Category Limited approval for the programs. Beginning with the Ventura County permit program, EPA noted that the legislature must change this status.[16] The obvious implication is that this statute

---

[8] CAL. HEALTH & SAFETY CODE §§40700-40730 (West 1986-1995).

[9] *See* 40 C.F.R. §§70.10-11 (1994).

[10] *See generally* CAL. HEALTH & SAFETY CODE §§42300-42454 (West 1986-1995).

[11] CAL. HEALTH & SAFETY CODE §§40200-40276 (West 1986-1995).

[12] CAL. HEALTH & SAFETY CODE §§40400-40540 (West 1986-1995).

[13] CAL. HEALTH & SAFETY CODE §§41010-41082 (West 1986-1995).

[14] CAL. HEALTH & SAFETY CODE §§41210-41267 (West 1986-1995).

[15] A permit shall not be required for: ...(e) Any equipment used in agricultural operations in the growing of crops or the raising of fowl or animals, except that the district board of any district which is, in whole or in part, south of the Sixth Standard Parallel South, Mount Diablo Base and Meridian, may require permits for the operation of orchard and citrus grove heaters. In no event shall a permit be denied an operator of such heaters if the heaters produce unconsumed solid carbonaceous matter at the rate of one gram per minute or less.

CAL. HEALTH & SAFETY CODE §42310(e) (West 1986-1995) (Copr. (C) West 1995) *cited in* 59 Fed. Reg. 63,290 (1994).

[16] 59 Fed. Reg. 60,108 (1994).

will affect all programs, and, if the statute is not changed, could lead to a failure to grant full approval to any program in California if not remedied. EPA has also noted that there are extensive provisions in the California code[17] for variances but relied on an opinion from the California Attorney General that these provisions did not affect Subchapter V implementation in California, and, EPA stated that any variances that might exist were wholly outside the scope of its authority to act in accordance with Federal law.[18]

With respect to Hazardous Air Pollutants and Section 112 programs, California requires CARB to adopt Section 112 standards when promulgated by EPA[19] and the local districts will then have authority to implement these standards once adopted by CARB.[20]

B. Ventura County Air Pollution Control District

The first of the programs acted upon by EPA in California was the program submitted by Ventura County Air Pollution Control District (*hereinafter* "Ventura"). EPA proposed interim approval of this program submitted by the CARB on November 16, 1993, with additional material submitted in December 1993 and February 1994.[21] EPA required several changes to be made in the regulatory program,[22] but noted that the program substantially met the requirements for establishing a valid Federally enforceable permit program.

---

[17] *See* CAL. HEALTH & SAFETY CODE §§42350-42364 (West 1986-1995) *cited in* 59 Fed. Reg. 60,105 (1994).

[18] 59 Fed. Reg. 60,105 (1994).

[19] *See* CAL. HEALTH & SAFETY CODE §39658 (West 1986-1995) *cited in* 60 Fed. Reg. 26,108 (1995).

[20] *See* CAL. HEALTH & SAFETY CODE §39666 (West 1986-1995) *cited in* 60 Fed. Reg. 26,108 (1995).

[21] 59 Fed. Reg. 60,104-60,105 (1994).

[22] Ventura's regulations that implement part 70 include Rule 8, Access to Facilities; Rule 15, Standards for Permit Issuance; Rule 15.1, Sampling and Testing Facilities; Rule 23, Exemption from Permit; Rule 26.1, New Source Review (definitions of "modified emissions unit," "new emissions unit," and "stationary source" only); Rule 29, Conditions on Permits (paragraph C only); Rule 33, Part 70 Permits; and Rule 42, Permit Fees. These rules, in conjunction with authorities granted under California State law, substantially meet the requirements of 40 CFR part 70, sections 70.2 and 70.3 for applicability; sections 70.4, 70.5, and 70.6 for permit content, including operational flexibility; section 70.7 for

In order to qualify for full approval of this program, Ventura must demonstrate that the insignificant activities rules comply with Federal rules.[23] Changes must be made to insure that permit modifications and public notice provisions comply with Federal rules.[24] The provisions of the rules respecting compliance schedules in permits, recordkeeping, permit content and emissions trading must be changed to comply with Federal rules.[25] Finally, Ventura must notify EPA of any changes under the operational flexibility provisions[26] before it can be granted full approval.

Ventura was not required to submit a fee demonstration as its fee was calculated at $65.34 per ton.[27] The preconstruction permitting program met the standards to implement Section 112 on an interim basis, and would have to be reviewed in the event EPA issued regulations on Section 112.[28] The Air Pollution Control Officer indicated that he would recommend to VCAPCD Board that it adopt applicable Federal rules regarding Acid rain by reference, and EPA found this proposal acceptable.[29] Action on this program is still pending.

C. Four Local Districts

The second proposed rulemaking on local permitting programs in California was issued on November 29, 1994,[30] and was a proposed disapproval of four separate programs. The programs that

---

public participation and minor permit modifications; section 70.5 for complete application forms; and section 70.11 for enforcement authority.

59 Fed. Reg. 60,105 (1994).

[23] 59 Fed. Reg. 60,108 (1994).

[24] 40 C.F.R. §§70.7 (e)-(f) (1994) *cited in* 59 Fed. Reg. 60,108 (1994).

[25] 40 C.F.R. §§70.5-70.6 (1994) *cited in* 59 Fed. Reg. 60,108 (1994).

[26] 40 C.F.R. §70.4(b) (1994) *cited in* 59 Fed. Reg. 60,108 (1994).

[27] 59 Fed. Reg. 60,106 (1994).

[28] 59 Fed. Reg. 60,106-60,107 (1994).

[29] 59 Fed. Reg. 60,107 (1995).

[30] 59 Fed. Reg. 60,931 (1994).

were the subject of this proposed rulemaking were the Glenn County Air Pollution Control District (*hereinafter* "Glenn County"); Lake County Air Quality Management District (*hereinafter* "Lake County"); Shasta County Air Quality Management District (*hereinafter* "Shasta County"); and, Tehama County Air Pollution Control District (*hereinafter* "Tehama County").[31] It is important to note that as of July, 1995, these were the only programs proposed for disapproval besides the Virginia program.[32] Unlike Virginia, the inadequacies of these programs that threatened their disapproval were resolved, and all four programs were ultimately granted interim approval.[33]

The unique disapproval issue for each of these programs was that they all provided that "exceedances during malfunctions or equipment shutdowns were not violations" of the respective programs.[34] This type of condition is expressly forbidden under the permit shield provisions of the Federal regulation.[35] This exemption potentially granted immunity for all Subchapter V violations related to the operation of equipment, and as a consequence, EPA found that the enforcement authority for each of the programs would be totally perverted.[36] EPA noted that these programs, therefore, did not "substantially meet" the requirements for properly developing a program that adequately the requirements of Subchapter V and Part 70,[37] and would have to be disapproved if these provisions were allowed to stand.

---

[31] *Id.*

[32] *See* 59 Fed. Reg. 31,183 (1994) *and* 59 Fed. Reg. 62, 324 (1994). *See infra* Part VI.A.

[33] 60 Fed. Reg. 36,065 (1995).

[34] 59 Fed. Reg. 60,934 (1994).

[35] *See* 40 C.F.R. §70.6(f-g) (1994).

[36] 40 C.F.R. §70.11 (1994) *cited in* 59 Fed. Reg. 60,934 (1994).

[37] The EPA will grant interim approval to any program if it meets each of the following minimum requirements:...

(vii) Enforcement. The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.

40 C.F.R. §70.4(d)(3)(vii) (1994) *cited in* 59 Fed. Reg. 60,934 (1994).

EPA found that the programs would otherwise be eligible for Source category limited approval, while viewing the variance authority of the districts as external to the part of the program, that must be approved by EPA.[38] Each district left the definition of "prompt," with respect to the reporting of permit deviations to the District Air Pollution Control officer, and EPA noted that it would review all permits for this requirement, if not included in any subsequent revisions to the regulations of the districts.[39] Each program had adequate authority to implement Section 112, and EPA proposed to implement Section 112(g) if interim approval was granted on an interim basis pending the Federal resolution of the regulations required by Section 112.[40] With respect to implementation of the acid rain program, EPA observed that no "Phase I" sources existed in California, and if any "Phase II" sources were identified, the districts had obligated themselves to provide rules as required,[41] and, the minimum fee charged by each program exceeded the presumptive minimum.[42]

EPA enunciated conditions that required alteration in each of the programs before full approval could be granted.[43] Each district must make a showing that insignificant activities would not be subject to an applicable requirement, and required each district to establish separate emissions levels for various regulated pollutants.[44] Each district contained an exemption for agricultural activities, which while complying with California's implementing statute,[45] must be removed to comply with Federal law.[46]

---

[38] *See supra* notes 17-18 and accompanying text.

[39] 59 Fed. Reg. 60,935 (1994).

[40] 59 Fed. Reg. 60,938 (1994).

[41] 59 Fed. Reg. 60,935 (1994).

[42] *Id.*

[43] 59 Fed. Reg. 60,936-60,937 (1994).

[44] *Id.*

[45] *See* discussion accompanying Part V, Notes 15-16, *supra.*

[46] 59 Fed. Reg. 60,937 (1994).

Rules respecting application content would have to be changed to include appropriate compliance schedules, require all necessary documentation be properly certified, and include applications deadlines for sources which become subject to Subchapter V after implementation.[47] The rules relating to permit issuance procedures would require notification to EPA and affected states of a refusal "to accept all recommendations for the proposed permit,"[48] and notify the public of their right to petition EPA after EPA's forty-five day review period.[49] Finally, the operation flexibility provisions must be changed to require notification of both EPA and the affected permitting authority.[50]

Glen County was required to act on reductions for early withdrawal within nine months of receipt of a complete application.[51] Lake County must revise its final deadlines for permit action, so that it acts after the complete application is received, than deemed complete.[52] Shasta County must revise its final deadlines for permit action, so that it acts after the complete application is received, than deemed complete; and, must remove prohibitions on the use of required reports.[53] Tehama County was required to alter its permit modifications to comply with Part 70.[54]

On July 13, 1995, EPA issued the final rulemaking for each of these districts. It granted interim approval on the basis that each district had adequately changed the objectionable language from their original programs.[55] The programs become effective August 14, 1995,[56] and the interim approval

---

[47] 40 C.F.R. §§70.5-70.6 (1994) *cited in* 59 Fed. Reg. 60,937 (1994).

[48] 59 Fed. Reg. 60,937 (1994).

[49] 40 C.F.R. §70.8 (1994) *cited in* 59 Fed. Reg. 60,937 (1994).

[50] 40 C.F.R. §70.4(b)(12) (1994) *cited in* 59 Fed. Reg. 60,937 (1994).

[51] 59 Fed. Reg. 60,937 (1994).

[52] *Id.*

[53] *Id.*

[54] 59 Fed. Reg. 60,938 (1994).

[55] 60 Fed. Reg. 36,067-36,068 (1995).

[56] 60 Fed. Reg. 36,065 (1995).

status is effective until August 13, 1997, with the requirement that corrective actions must be submitted to EPA by February 13, 1997 to avoid the initiation of sanctions.[57] This approval does not apply to any Indian Reservations that might be located within the affected districts.[58]

D. Bay Area Air Quality Management District

The next district in California that was the subject of action by Region 9 was the Bay Area Air Quality Management District (*hereinafter* "Bay Area") which included San Francisco. On November 29, 1994,[59] EPA proposed interim approval of this program.[60] In addition to the statewide issue of source category limited approval applicable to agricultural sources,[61] Bay Area also requested, and EPA approved the request, that it be granted source category limited approval so that all of its approximately 5,000 sources would be permitted within five years instead of three.[62]

EPA proposed to use Bay Area's preconstrcution permit program for the purposes of enforcing Section 112, and also noted that the implementation plan for Bay Area included a synthetic minor permit program which would be integrated into the scheme for enforcing Subchapter V.[63] The Bay Area also proposed to charge $77.00 per ton of regulated pollutant, which far exceeded the

---

[57] 60 Fed. Reg. 36,068 (1995).

[58] *Id.*

[59] 59 Fed. Reg. 60,939 (1994).

[60] *See generally* Bay Area AQMD Regulation 2, Rule 6, §§2-6-100 to -602 (1995).

[61] *See supra* notes 15-16 and accompanying text.

[62] 59 Fed. Reg. 60,940 (1994).

[63] This District program is referred to as a synthetic minor operating permit program, and it consists of regulations that will be integrated with the District's existing, non-federally enforceable, operating permit program. Such programs are also referred to as federally enforceable state operating permit programs or FESOP. This synthetic minor or FESOP mechanism will allow sources to reduce their potential to emit to below the title V applicability thresholds and avoid being subject to title V.

59 Fed. Reg. 60,943-60,944 (1994).

presumptive minimum, thus requiring no fee demonstration.[64] Finally, Bay Area committed to incorporate "pertinent provisions" of Federal regulations[65] to comply with the Acid rain provisions.

EPA required seventeen specifically listed changes prior to full approval of this program. Among these was a requirement that the local rules be changed to comply with acid rain regulations.[66] The district also needed to clarify that any "activities subject to an applicable requirement cannot be classified as insignificant activities,"[67] or in the alternative provide specific listings for regulated pollutants that would likely not be subject to Subchapter V. The definition of "applicable requirement"[68] would have to be brought in line with the federal definition.[69] EPA required that the permit terms and conditions must adhere to all requirements and all certifications be identical.[70] Reforms would also be required in the areas of permit modifications, minor permit amendments, public notice provisions, notice to affected states, emissions trading provisions, compliance progress reports, compliance certification reports; off-permit changes; and the definition of a "regulated air pollutant."[71]

---

[64] 59 Fed. Reg. 60,941 (1994).

[65] 40 C.F.R. Part 72 (1994) *cited in* 59 Fed. Reg. 60,941 (1994).

[66] 59 Fed. Reg. 60,941-60,942 (1994).

[67] 59 Fed. Reg. 60,942 (1994).

[68] 2-6-207 Federally Enforceable: All limitations and conditions which are enforceable by the Administrator of the U.S. EPA, including requirements developed pursuant to 40 CFR Parts 60 (NSPS), 61 (NESHAPS), 63 (HAP), 70 (State Operating Permit Programs), and 72 (Permits Regulation, Acid Rain),requirements contained in the State Implementation Plan (SIP)that are applicable to the District, any District permit requirements established pursuant to 40 CFR 52.21 (PSD) or District regulations approved pursuant to 40 CFR Part 51, Subpart I (NSR), and any operating permits issued under an EPA-approved program that is a part of the SIP and expressly requires adherence to any permit issued under such program.

Bay Area AQMD Regulation 2, Rule 6, §2-6-207 (1995) (Copr. (c) 1995 ERM Computer Information Services, Inc.) *cited in* 59 Fed. Reg. 60,942 (1994).

[69] *See* 40 C.F.R. §70.2 (1994).

[70] Certifications by the responsible official must include the following two elements: (1) based on truth, accuracy, and completeness; and (2) based on information and belief formed after reasonable inquiry.

59 Fed. Reg. 60,942 (1994).

[71] *Id.*

On June 23, 1995, EPA issued final interim approval to the Bay Area program as originally proposed, with some minor modifications, with an effective date of July 24, 1995.[72] EPA also issued two other rulemakings on June 23, one which approved the synthetic minor operating program,[73] and another which was a direct final rule approving revisions to the Subchapter V permit program and synthetic minor permit program as implementation plan revisions.[74] Bay Area must submit a corrective program to EPA no later than January 23, 1997 in order to avoid the implementation of sanctions and the interim status expires July 23, 1997.[75]

E. Nineteen Local Programs

On December 8, 1994, EPA proposed source category limited interim approval status for nineteen separate districts in California.[76] EPA observed that the programs were all similar to a CARB model program, which contributed to a review of the programs.[77] None of the districts involved explicitly stated what a "prompt" reporting of a permit deviation would be, so EPA reiterated that it would veto any permits that did not meet standards in this area.[78] All the districts involved satisfied EPA that the fees to be collected would be at or above the presumptive minimum as adjusted by the Consumer Price Index.[79] The programs were adequate in EPA's view to implement Section 112 and

---

[72] 60 Fed. Reg. 32,606 (1995).

[73] 60 Fed. Reg. 32,606-32,609 (1995).

[74] 60 Fed. Reg. 32,639-32,640 (1995).

[75] 60 Fed. Reg. 32,610 (1995).

[76] Fifteen of these programs were Air Pollution Control Districts located in Amador County, Butte County, Calaveras County, Colusa County, El Dorado County, the Great Basin Unified Air Pollution Control District, Imperial County, Kern County, Lassen County, Mendocino County, Modoc County, Northern Sonoma County, Placer County, Siskiyou County and Tuolumne County. The remaining districts were the Air Quality Management Districts of Feather River, North Coast Unified, Northern Sierra, and Yolo-Solano.

59 Fed. Reg. 63,289 (1994).

[77] 59 Fed. Reg. 63,290 (1994).

[78] 59 Fed. Reg. 63,292 (1994).

[79] *Id.*

only two of the programs involved (North Coast Unified and Imperial County) had Phase II acid rain sources which would require any action in the area of acid rain.[80] Ultimately, EPA determined that the method used to implement Section 112 in all these districts would be through the use of their preconstruction programs.[81]

EPA cited eleven issues that were interim approval issues for all nineteen districts, but included caveats in several of these identified issues. All districts except Mendocino County and Northern Sonoma would have to demonstrate that insignificant activities were exempt from Federal regulation.[82] With the exception of Great Basin Unified, Lassen County and Mendocino County districts,[83] where there was no agricultural exemption, that exemption would have to be lifted[84]

All districts would be required to reform their permit content requirements to allow that compliance schedules in permits would concur with existing consent orders or judicial decrees and that all districts, except for Yolo-Solano, must change their rules to ensure that documents submitted to the permitting authority would have to be properly certified in accordance with Federal rules.[85]

Only Northern Sierra and Yolo-Solano complied with the requirement that existing sources, which become subject to Part 70 for reasons other than commencing operations, obtain permits within twelve months of the time they become so subject.[86] All districts must alter their rules to notify affected states and EPA of a refusal to comply with recommendations to change permits; include notification of the public's right to petition EPA;[87] and, revise rules to provide for adequate public

---

[80] *Id.*

[81] 60 Fed. Reg. 21,721 (1995).

[82] 59 Fed. Reg. 63,293 (1994).

[83] *Id.*

[84] *See supra* notes 15-16 and accompanying text.

[85] 40 C.F.R. §70.5 (1994) *cited in* 59 Fed. Reg. 63,293 (1994).

[86] 40 C.F.R. §70.5(a)(1) (1994) *cited in* 59 Fed. Reg. 63,293 (1994).

[87] 40 C.F.R. §70.8 (1994) *cited in* 59 Fed. Reg. 63,293-63,294 (1994).

notice of permitting actions.[88] Except for Yolo-Solano, all districts would have to require that all submitted documents be properly certified; and that any sources file compliance certifications as frequently as required by any requirements.[89]

For each individual district, EPA enumerated additional approval issues which must be resolved prior to full approval. Amador County must complete action on complete permit applications within twelve months of the receipt of the application, as opposed to when the application is deemed complete; include "federally enforceable limitations" in the definition of a source's potential to emit; require notification to the district and EPA of operational flexibility changes; and, include appropriate tribal authorities in the definition of affected states.[90]

Butte County must take action on early reduction applications within nine months of receipt; ensure that a minor permit modification is deemed a significant permit modification until declared otherwise by competent authority; and ensure that significant permit modification procedures comply with Federal rules.[91] Calaveras County's interim approval issues were limited to the issues common to all districts.[92] Colusa County would have to ensure that a minor permit modification is deemed a significant permit modification until declared otherwise by competent authority; and ensure that sources did not commence operations on modifications that might require preconstruction review.[93]

EPA at first recommended, but did not require that El Dorado County change its permit modification procedures to authorize the "the use of economic incentives, marketable permits,

---

[88] 40 C.F.R. §70.7 (1994) *cited in* 59 Fed. Reg. 63,294 (1994).

[89] 40 C.F.R. §70.6 (1994) *cited in* 59 Fed. Reg. 63,294 (1994).

[90] 59 Fed. Reg. 63,294 (1994).

[91] *Id.*

[92] *Id.*

[93] 59 Fed. Reg. 63,295 (1994).

emissions trading, and other similar approaches."[94] EPA then changed this recommendation to a requirement and opined that this would be a moot point considering the fact that it anticipated the issuance of a Federal Implementation Plan in early 1995 for this district, Feather River, Placer, and Yolo-Solano, which were all part of the Sacramento ozone non-attainment area, which would require these as part of the implementation plan. In addition, the district would have alter its permit content requirements so that no revisions would be required if the incentives were used in any authorized form.[95] Instead of issuing a FIP, the ozone attainment status of these districts and Sacramento Metropolitan was increased to "severe,"[96] which, among other things would increase the number of NOx and VOC major sources by lowering the threshold for a NOx and VOC major source to twenty-five tons per year from fifty tons per year.[97]

The Feather River Air Quality Management District was required to make changes to its permit modification and content requirements[98] for the same reasons as El Dorado County.[99] In addition, the rules would have to be changed to prohibit operation of a source which has noticed a permit revision, but not completed action on the permit revision.[100]

Three changes would be required to the Great Basin Unified Air Pollution Control District's rules to ensure compliance. First, there was an apparent immunity which allowed sources to apply for permits no later than twelve months after the source was identified as a Part 70 source.[101] Revisions were required so that applications would be acted upon appropriately after receipt, rather than when an

---

[94] *Id.*

[95] *Id.*

[96] 60 Fed. Reg. 20,237-20,238 (1995).

[97] 60 Fed. Reg. 29,811 (1995).

[98] 59 Fed. Reg. 63,295 (1994).

[99] *See supra* notes 95-98 and accompanying text.

[100] 59 Fed. Reg. 63,295 (1994).

[101] Great Basin Unified Rule 217 IV.B.1.b. (1994) *cited in* 59 Fed. Reg. 63,295 (1994).

application was deemed complete; and require sources to notify EPA and the district when any operational flexibility changes were implemented.[102]

Imperial County would have to act on final reduction applications within an appropriate time frame after receipt of the documentation; submit an acid rain program and require sources to notify EPA and the district when any operational flexibility changes were implemented.[103] Kern County had no additional interim approval issues.[104]

Lassen County must act on completed applications after receipt, rather when the application was deemed complete; clarify that a local approval of a minor permit modification is not final "until after EPA's review period or until EPA has notified the district that EPA will not object,"[105] ensure that the compliance provisions of the local rule require the source to operate under the original permit terms until a revision is approved; prohibit operation of significant modifications until such time as the modified permit is issued; and require sources to notify EPA and the district when any operational flexibility changes were implemented.[106]

Modoc County must act on completed applications after receipt, rather when the application was deemed complete; clarify that a local approval of a minor permit modification is not final "until after EPA's review period or until EPA has notified the district that EPA will not object,"[107] ensure that the compliance provisions of the local rule require the source to operate under the original permit terms until a revision is approved; prohibit operation of significant modifications until such time as the

---

[102] 59 Fed. Reg. 63,296 (1994).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] 59 Fed. Reg. 63,296-63,297 (1994).

modified permit is issued; and require sources to notify EPA and the district when any operational flexibility changes were implemented.[108]

The North Coast Unified Air Quality Management District would have to act on final reduction applications within an appropriate time frame after receipt of the documentation; submit an acid rain program and require sources to notify EPA and the district when any operational flexibility changes were implemented.[109] The Northern Sierra Air Quality Management District had no additional interim approval issues.[110] Northern Sonoma County would have to revise its regulation so that exemptions would comply with Federal rules; act on completed applications after receipt, rather when the application was deemed complete; and, require sources to notify EPA and the district when any operational flexibility changes were implemented.[111]

Placer County's definition of a "major source" was inadequate and would have to be changed; eliminate the discretion of the district to authorize operation of sources that had applied for permit modifications to operate with those modifications until permit revisions had been issued; and, authorize use of minor permit modifications when appropriate.[112] Finally, the district must act on completed applications after receipt, rather when the application was deemed complete; and require sources to notify EPA and the district when any operational flexibility changes were implemented.[113]

Siskiyou County would have to eliminate the discretion of the district to authorize operation of sources that had applied for permit modifications to operate with those modifications until permit revisions had been issued; act on completed applications after receipt, rather when the application was

---

[108] 59 Fed. Reg. 63,297 (1994).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] 59 Fed. Reg. 63,297-63,298 (1994) *See supra* notes 95-98 and accompanying text.

[113] 59 Fed. Reg. 63,298 (1994).

deemed complete; and require sources to notify EPA and the district when any operational flexibility changes were implemented.[114] In addition, a proviso must be added to ensure that if a source does not comply with a modification, and the applicable requirements that apply to the modification, then the terms of the existing permit could be enforced against the source.[115]

The three changes required to the program submitted by Tuolumne County Air Pollution Control District program were action on final reduction applications within an appropriate time frame after receipt of the documentation; a revision of the term "potential to emit" so that "Federally enforceable limitations" would be considered in this term; and a requirement that sources notify EPA and the district when any operational flexibility changes were implemented.[116] Yolo-Solano would have to change its minor modification procedures and authorize the use of emissions trading as a minor modification provision when appropriate.[117]

EPA' final action on these nineteen districts was taken collectively on May 3, 1995.[118] The effective date of the interim approval is June 2, 1995.[119] EPA noted that there were no changes to the requirements for full approval as earlier stated. The programs interim status continues through June 3, 1997, and each program must submit a corrective program no later than December 3, 1996, in order to avoid the imposition of sanctions.[120] The extent of the approved programs did not encompass any Federally recognized Indian reservations that might be within the districts involved in the rulemaking.[121]

---

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id. See supra* notes 95-98 and accompanying text.

[118] 60 Fed. Reg. 21,720 (1995).

[119] *Id.*

[120] 60 Fed. Reg. 21,722 (1995).

[121] *Id.*

F. Monterey Bay Unified Air Pollution Control District

On May 16, 1995, Region 9 proposed that the Monterey Bay programs be granted source category limited interim approval.[122] The district sought source category limited approval so that it would be able to defer permitting the district's smaller sources until three years after approval has been granted interim approval for the program on the basis that this distribution of acting on sources would be a better use of the district's resources in enforcing the permit program.[123] No permit fee demonstration would be required because the district would be charging an average of ninety-two dollars per ton of regulated pollutant.[124] The Section 112 program, including the preconstruction program, was approved as the permit program encompassed adequate authority, along with California's implementing law, to meet this requirement.[125]

Changes that must be made to the program prior to the granting of full approval include revisions to include acid rain and solid waste sources in the program;[126] and revising the definitions of "administrative permit amendments," "Federally enforceable requirements," and "minor permit modification."[127] Provisions relating to compliance certification, compliance schedules, and insignificant activities must be brought into line with Federal rules.[128] The district must also change its rules relating to public notification and comment procedures,[129] EPA notification, and affected states

---

[122] 60 Fed. Reg. 26,103 (1995).

[123] *Id.*

[124] 60 Fed. Reg. 26,016 (1995).

[125] 60 Fed. Reg. 26,018 (1995).

[126] 60 Fed. Reg. 26,016-26,017 (1995).

[127] 60 Fed. Reg. 26,017 (1995).

[128] 40 C.F.R. §70.5 (1994) *cited in* 60 Fed. Reg. 26,017 (1995).

[129] 40 C.F.R. §70.7 (1994) *cited in* 60 Fed. Reg. 26,017 (1995).

notification to comply with Federal rules.[130] Finally, minor permit modification procedures would have to be reformed to concur with applicable Federal rules.[131] Action on this program is still pending.

G. Sacramento Metropolitan Air Quality Management District

The Sacramento Metropolitan Air Quality Management District (*hereinafter* "Sacramento") is a specially created district under California law.[132] On June 6, 1995, Region 9 proposed that Sacramento be granted interim approval.[133] EPA noted that the ozone attainment status of this district would be changed from "serious" to "severe,"[134] and this change did in fact become effective June 1, 1995.[135] Among the practical effects of this change in attainment status is to increase the number of sources of NOx and VOC that would be subject to Subchapter V permit program requirements by redefining the major source for those pollutants as one that emits twenty-five tons per year instead of fifty tons per year.[136]

EPA noted that the final rulemaking on interim approval criteria, including the definition of a "Title I modification," was still pending,[137] and that the definition used by Sacramento would not be an impediment to approval. The fee that is proposed to be collected by Sacramento is an average of ninety-seven dollars per ton, so no fee demonstration was required, and it proposed a straight delegation of authority under Section 112, including using the preconstruction program to implement

---

[130] 40 C.F.R. §70.8 (1994) *cited in* 60 Fed. Reg. 26,017 (1995).

[131] 40 C.F.R. §70.7(e) (1994) *cited in* 60 Fed. Reg. 26,017 (1995).

[132] *See generally* CAL. HEALTH & SAFETY CODE §§41010-41082 (West 1986-1995).

[133] 60 Fed. Reg. 29,809 (1995).

[134] 60 Fed. Reg. 29,811 (1995).

[135] 60 Fed. Reg. 20,237-20,238 (1995) *codified at* 40 C.F.R. §81.305 (1995).

[136] 60 Fed. Reg. 29,811 (1995).

[137] 60 Fed. Reg. 29,812 (1995).

Section 112(g) on an interim basis.[138] EPA stated that there were no Acid Rain sources in the district, so that program did not apply.[139]

In addition to changes required in the Agricultural exemption that apply to all sources in the state,[140] the utilization of "insignificant activities" as a method of excluding potential sources must be reviewed and approved by EPA before final use. Restrictions on the use of "operational flexibility" must be tightened; and permit issuance deadlines must insure that all permits are issued no later than December 15, 1999. Finally, emissions trading provisions must be added to the regulations; fugitive emissions must be added into permits; and, public participation procedures must conform to the Federal standards.[141] This proposed approval does not apply to any federally recognized Indian Reservations that may be within the geographical limits of this district.[142]

On August 4, 1995,[143] EPA granted interim approval to the Sacramento program, which authorized the regulation of all sources covered within the limits of the district, except for sources located within Indian Reservations.[144] The interim approval becomes effective September 5, 1995,[145] and extends until September 4, 1997, with the district being required to submit a corrective program by March 4, 1997, to avoid the implementation of sanctions.[146] Additionally, EPA approved the county preconstruction permit program for the purposes of implementing the permit program with respect to

---

[138] 60 Fed. Reg. 29,812-29,813 (1995).

[139] 60 Fed. Reg. 29,813 (1995).

[140] *See supra* notes 15-17 and accompanying text.

[141] 60 Fed. Reg. 29,813-29,814 (1995).

[142] 60 Fed. Reg. 29,814 (1995).

[143] 60 Fed. Reg. 39,862 (1995).

[144] 60 Fed. Reg. 39,683 (1995).

[145] 60 Fed. Reg. 39,862 (1995).

[146] 60 Fed. Reg. 39,683 (1995).

hazardous air pollution modifications and extended by straight delegation, provisions for the implementation of the hazardous air pollution permit program for the district as well.[147]

H. Mojave Desert Air Quality Management District

On July 3, 1995, Region 9 proposed that the Mojave Desert Air Quality Management District (*hereinafter* "Mojave Desert") be granted interim approval status in the same manner as it had proposed for other California programs.[148] EPA found that the fees proposed to be assessed by this program exceeded the presumptive minimums;[149] and that the program would need to finalize its acid rain program prior to full approval.[150]

EPA required nine itemized changes to grant this program full approval, one of which was the finalization of an acid rain program. The other changes included prohibition on the use of the permit shield for minor permit modifications;[151] sending completed permits to EPA, and altering the reopening requirements for permits.[152] Of particular importance to EPA was changing the rules to insure that preexisting violations if any, would not be subject to protection by a permit shield.[153] The levels at which Mojave Desert proposed as cutoff levels for determining "insignificant" activities would need clarification to insure that they were not too high, and that proper criteria for determining when equipment was authorized to be exempt from permitting activities would need to be applied.[154] Finally,

---

[147] *Id.*

[148] 60 Fed. Reg. 34,488 (1995).

[149] 60 Fed. Reg. 34,490 (1995).

[150] *Id.*

[151] 60 Fed. Reg. 34,490-34,491 (1995).

[152] 60 Fed. Reg. 34,491 (1995).

[153] [T]he permit shield shall not limit liability for violations which occurred prior to or at the time of the issuance of the federal operating permit, by adding the underlined words. This is important to clarify that violations which are continuing at the time of permit issuance will not be shielded against.

60 Fed. Reg. 34,491 (1995).

[154] 60 Fed. Reg. 34,491 (1995).

adjustments were required to the district's rules dealing with reporting deviations from permit requirements that would be necessary to comply with existing Federal Standards.[155]

With respect to Section 112 implementation, EPA proposed to approve as part of its rulemaking with respect to the permit program, a Federally Enforceable State Operating Program (*hereinafter* FESOP) for Synthetic Minor sources, and EPA believed that this program would be acceptable even though EPA had not finalized its regulations on Section 112 sources.[156] This mechanism is similar to the one approved in the Bay Area Air Quality Management District.[157] Final action on this program is still pending.

I. Santa Barbara County Air Pollution District

On July 10, 1995, Region 9 proposed granting interim approval status to the program submitted by CARB on behalf of the Santa Barbara County Air Pollution District (*hereinafter* "Santa Barbara" or the "district").[158] EPA found that the regulations[159] proposed by EPA generally met the standards required by Part 70 and Subchapter V for the establishment of a program. The average permit fee that was to be collected by the district was an average of $112.20 per ton exceeded the presumptive minimum and no demonstration was required.[160] With respect to Section 112 implementation, EPA noted that adequate authority existed for the permit program to comply with this

---

[155] *See* 40 C.F.R. §70.6 (a)(3)(iii) (1994) *cited in* 60 Fed. Reg. 34,491 (1995).

[156] 60 Fed. Reg. 34,492-34,493 (1995).

[157] *See supra* notes 73-74 and accompanying text.

[158] 60 Fed. Reg. 35,538 (1995).

[159] *See generally* Santa Barbara County APCD R. 201, 202, 205, 210 and 1301-1305 (1995) *cited in* 60 Fed. Reg. 35,539 (1995).

[160] 60 Fed. Reg. 35,541 (1995).

requirement and proposed to use the preconstruction program as an interim measure to implement those standards pending the issuance of EPA regulations on the subject.[161]

In addition to the statewide agricultural exemption interim approval issue and variance exclusions,[162] EPA listed fourteen deficiencies that would require clarification or change before full approval could be granted to this program.[163] Among these changes that would be required were altering the definition of a variance to include adhering to compliance schedules and clarifying permit content requirements.[164] The term "insignificant activities" must be clarified to establish appropriate emission levels, that full information be submitted by the source on insignificant activities,[165] as opposed to excluding some non-federally enforceable items from identification, which is contrary to the Federal rule.[166] Operational flexibility requirements would have to change to comply with applicable law.[167] The provisions for Administrative permit amendments, must be clarified so that all identified changes would be approved by EPA, minor permit modification procedures and public notice requirements would have to comply with existing Federal rules.[168]

Significant changes would be required to the form of an applicable requirement in the local regulations, applicable trading requirements and EPA proposed that deviations from permit conditions

---

[161] 60 Fed. Reg. 35,543-35,544 (1995).

[162] *See supra* notes 15-18 and accompanying text.

[163] 60 Fed. Reg. 35,542-35,543 (1995).

[164] 60 Fed. Reg. 35,542 (1995).

[165] " Insignificant Activities" mean those equipment, operations and activities listed as exempt from District permitting pursuant to Sections A.1., A.2., C, D, E and F of District Rule 202 (Exemptions to Rule 201). A list of all insignificant activities at the Part 70 source shall be listed in its Part 70 operating permit application. Also, all information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate any applicable permit fees must be provided for each of the insignificant activities listed in the permit application. No federally enforceable requirement for emissions allowable under the permit shall be listed for these insignificant activities in the permit.

Santa Barbara County APCD R. 1301 (1995) (Copr (c) 1995 ERM Computer Information Services, Inc.) *cited in* 60 Fed. Reg. 35,542 (1995).

[166] 40 C.F.R. §70.5(c) (1994) *cited in* 60 Fed. Reg. 35,542 (1995).

[167] 40 C.F.R. §70.4 (1994) *cited in* 60 Fed. Reg. 35,542 (1995).

[168] 40 C.F.R. §70.7 (1994) *cited in* 60 Fed. Reg. 35,542 (1995).

be required within seventy-two hours of the deviation.[169] Exemptions under the Santa Barbara rules would have to be modified to exclude Solid waste incinerators and recordkeeping requirements would have to be strengthened in the area of "off-permit changes."[170] Finally, EPA required that the existing "Title I modification" definition be amended,[171] and that any utilization of an emergency defense consistent with the Federal rule,[172] be reported within two days, rather than four days. Action on this program is still pending.

---

[169] 60 Fed. Reg. 35,542-35,543 (1995).

[170] 60 Fed. Reg. 35,543 (1995).

[171] Santa Barbara must finalize and submit to EPA interpretive guidance demonstrating that all modifications under 40 CFR part 60 will be treated as significant permit modifications. In order to receive full approval, Santa Barbara must clarify the definitions of "title I (or major) modification" and "significant part 70 permit modification" to include all modifications under 40 CFR part 60.

60 Fed. Reg. 35,543 (1995).

[172] 40 C.F.R. §70.6(g)(3)(iv) (1994) *cited in* 60 Fed. Reg. 35,543 (1995).

VI

Disapproved Programs, the Tenth Amendment, and Standing

A. Virginia

Only one program has been fully disapproved by EPA. On June 17, 1994, EPA proposed disapproval of this program,[1] and finally did so on December 5, 1994, with a final effective date for the disapproval of January 4, 1995.[2] In its proposal to disapprove the Virginia program, EPA cited several reasons for the proposed disapproval. First, the regulations that Virginia submitted in support of its application were scheduled to expire on June 28, 1994, with no prospect of renewal or extension.[3]

EPA listed areas of concern in the statutory authority that was purported to be supporting this program. Virginia's statute[4] on standing did not allow all persons who had participated in the permitting process to seek relief in court from an unfavorable decision if they had participated in the public review process. In EPA's opinion, the standing requirement was limited to persons who had a

---

[1] 59 Fed. Reg. 31,183 (1994).

[2] 59 Fed. Reg. 62,324 (1994).

[3] 59 Fed. Reg. 31,183 (1994).

[4] Any person who is aggrieved by a final decision of the Board under § 10.1-1322, who participated, in person or by submittal of written comments, in the public comment process related to the Board's decision and who has exhausted all available administrative remedies for review of the Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). The person invoking jurisdiction under this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court.

VA. CODE ANN. §10.1-1318(B)(i-iv) (Michie 1950-1995) *cited in* 59 Fed. Reg. 31,184 (1994).

"immediate, pecuniary, and substantial interest,"[5] and this requirement was too narrow in the context of the constitutional, statutory and regulatory requirements imposed by Federal law in this area.[6] EPA concluded that the Virginia law on standing was more stringent than applicable Federal case law.[7]

The second statutory disqualification was that the law applicable to Virginia's administrative procedures provided for default issuance of permits[8] that would effectively eviscerate EPA's authority[9] to issue objections to proposed permits, and there was no assurance that EPA and affected states would be given an "adequate opportunity for review of proposed permits."[10] However, these objections appear to have been dealt with successfully in a law passed by Virginia in 1995.[11] Finally, Virginia's statutory authority in the area of variances[12] was not the subject of commentary by EPA because it was deemed wholly outside of EPA's authority to act.[13]

The regulations submitted by the commonwealth were also inadequate in that they did not attempt to regulate all the sources required to be regulated under Federal rules,[14] and attempted to extend federally enforceable authority to provisions that were not enforceable.[15] Virginia's fee

---

[5] 59 Fed. Reg. 31,184 (1994).

[6] The requirement for standing for judicial review, as specifically required by section 502(b)(6) of the CAA and 40 CFR 70.4(b)(3)(x), must provide standing for any person who has participated in the public comment process and any other person who could obtain judicial review of that action under applicable law. EPA interprets section 502(b)(6) of the CAA as requiring that title V permits programs must provide judicial review to any party who participated on the public comment process and who at a minimum meets the threshold standing requirements of Article III of the U.S. Constitution.

59 Fed. Reg. 31,184 (1994).

[7] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992) *cited in* 59 Fed. Reg. 31,184 (1994).

[8] *See* VA. CODE ANN. §§9-6.14:3, 11, 12 (Michie 1950-1995) *cited in* 59 Fed. Reg. 31,184 (1994).

[9] CAA §505(b)(3), 42 U.S.C.A. §7661d(b)(3) (1983-1995) *and* 40 C.F.R. §70.8(e)(1994) *cited in* 59 Fed. Reg. 31,184 (1994).

[10] 59 Fed. Reg. 31,184 (1994).

[11] *See* 1995 Va. Acts 398 *codified at* VA. CODE ANN. §§9-6.14:11-12 (Michie 1950-1995).

[12] VA. CODE ANN. §10.1-1307.C (Michie 1950-1995) *cited in* 59 Fed. Reg. 31,184 (1994).

[13] 59 Fed. Reg. 31,184 (1994).

[14] *Id.*

[15] 59 Fed. Reg. 31,184-31,185 (1994).

provisions were not clear enough to assess whether the program would be self-sufficient, and, it was not certain whether the state properly calculated all the revenues that would be obtained from acid rain sources.[16] This objection appears to have been dealt with by the Virginia General Assembly in 1995.[17] With respect to implementation of Section 112, EPA noted that Virginia had committed to implement these provisions once EPA had issued adequate guidance.[18] EPA stated that there already existed adequate statutory and regulatory authority for Virginia to regulate these pollutants.[19] EPA was satisfied with Virginia's commitment to implement acid rain provisions.[20]

In issuing the final rulemaking on this program, EPA dealt with several comments to provide a record for the positions that it took.[21] EPA observed that no showing of an economic injury is required by the Supreme Court in environmental cases.[22] EPA responded to allegations that Subchapter V was an "unconstitutional invasion of State sovereignty,"[23] by stating that this was an exercise of cooperation between the states and the Federal government.[24] EPA noted that the Federal government is authorized to condition the receipt of funds (in this case transportation funds) on the state's compliance with Federal directives.[25] Finally, EPA noted that it would have to conduct the program if the state did not have a fully approved program in place.[26]

---

[16] 59 Fed. Reg. 31,185 (1994).

[17] *See* 1995 Va. Acts 158 *codified at* VA. CODE ANN. §10.1-1322 (Michie 1950-1995).

[18] *Id.*

[19] CAA §112(g), 42 U.S.C.A. §7412(g) (1983-1995), *cited in* 59 Fed. Reg. 31,185 (1994).

[20] 59 Fed. Reg. 31,185 (1994).

[21] 59 Fed. Reg. 62,324-62,327 (1994).

[22] *See* Sierra Club v. Morton 405 U.S. 727 (1972) *cited in* 59 Fed. Reg. 62,325 (1994).

[23] 59 Fed. Reg. 62,325 (1994).

[24] Rather, this program is clearly one of cooperative federalism that encourages the States to enact and enforce a State program, incorporating title V's standards, by offering incentives to do so.

59 Fed. Reg. 62,325 (1994).

[25] *See* South Dakota v. Dole 483 U.S. 203 (1987) *and* Fullilove v. Klutznick 448 U.S. 448 (1980) *cited in* 59 Fed. Reg. 62,325 (1994).

[26] 59 Fed. Reg. 62,325 (1994).

The statute that authorizes public participation in the permit process also requires that persons who did participate in the public comment process be able to sue in court if they are not satisfied with the outcome of the permit.[27] Similarly, the regulations require that no program will be approved if the state does not certify that there is sufficient opportunity for judicial review and that the participating public may obtain this judicial review.[28]

The Supreme Court has held that proper standing is essential to jurisdiction. With respect to laws governing litigation concerning endangered species, and the use of foreign aid moneys, the court has had to deal with the appropriate standing of parties in litigation.[29] The court held that "the core component of standing is an essential and unchanging part of the case-or controversy requirement of Article III."[30] The court then laid out a three part test for determining whether a party has standing.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally- protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (citations omitted)[31]

The court further explained that the particularize "mean[s] the injury must affect the plaintiff in a personal and individual way."[32]

---

[27] CAA §502 (b)(6), 42 U.S.C.A. §7661a(B)(6) (1983-1995).

[28] Provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to §70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws.

40 C.F.R. §70.4(b)(3)(x) (1994)

[29] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[30] *Id.* at 560.

[31] *Id.* at 560-561.

[32] *Id.* at 560, n. 1.

The Virginia statute that EPA found to be violative of Subchapter V and its applicable regulations required that an injury be the result of "an invasion of an immediate, legally protected, pecuniary, and substantial interest which is concrete and particularized[.]"[33] Does the Federal statute[34] create standing where it should not exist?

B. The Tenth Amendment and Subchapter V

The method used by Congress to engender cooperation by the states in the creation and application of the state permit programs is not new. Congress has used the Federal transportation fund to obtain an effective national drinking age of twenty-one.[35] The statute[36] directed that five per cent[37] of a state's designated transportation funds[38] in fiscal year 1987, and ten per cent of the designated funds[39] be withheld from a state if the state did not have a drinking age of at least twenty-one. This statute was challenged by South Dakota on several different grounds. The first issue was whether or not Congress exceeded its constitutional authority in the area of alcoholic beverage controls in states.[40] The other issues which decided the validity of this statute were whether or not Congress exceeded its authority under "spending clause,"[41] and whether or not the statute unreasonably intruded into the inherent powers of the states.[42]

---

[33] VA. CODE ANN. §10.1-1318(B)(ii) (Michie 1950-1995).

[34] CAA §502(b)(6), 42 U.S.C.A. §7661a(b)(6) (1983-1995).

[35] 23 U.S.C.A. §158 (1983-1995).

[36] *Id.*

[37] 23 U.S.C.A. §158(a)(1) (1983-1995).

[38] The funds that were the subject to this restriction were authorized pursuant to 23 U.S.C.A. §104(b)(1-2), (5-6) (1983-1995). *See* 23 U.S.C.A. §158(a)(1) (1983-1995).

[39] 23 U.S.C.A. §158(a)(2) (1983-1995).

[40] *See* U.S. CONST. amend. XXI, §2 *cited in* South Dakota v. Dole, 791 F.2d 628 (8th Circ. 1986) *aff'd* 483 U.S. 203 (1987).

[41] *See* U.S. CONST. art I, §8, cl. 1 *cited in* South Dakota v. Dole, 791 F.2d 628 (8th Circ. 1986) *aff'd* 483 U.S. 203 (1987).

[42] *See* U.S. CONST. amend. X *cited in* South Dakota v. Dole, 791 F.2d 628 (8th Circ. 1986) *aff'd* 483 U.S. 203 (1987).

The discussion of the cases relating to alcohol sales are not relevant to this paper. However, Congress has used essentially the same approach with the potential use of sanctions.[43] The United States Court of Appeals for the Eighth Circuit found that with respect to the spending clause, this method of determining the appropriateness of allocating funds was legally sufficient. Reviewing a lengthy history of Supreme Court rulings in the area, the Court of Appeals noted that there were three conditions on the utilization of the spending power as a means to affect a particular end. First, Congress must be advancing a national, as opposed to regional interest.[44] Second, the "conditions imposed by Congress must be reasonably related to the national interest Congress seeks to advance."[45] Third, there must be no other constitutional prohibitions to the desired outcome that Congress seeks to impose by this use of the funds.[46] The court believed that deference to Congress's use of transportation funds in this area was appropriate[47] in seeking to advance the national welfare.

The Appeals Court found that the argument regarding the claims by South Dakota that the seeming imposition of a national drinking age, through this particular vehicle, did not exceed Congress's enumerated powers. The court observed that the state could have kept its laws the same and refused to yield to Congressional pressure.[48] The court noted that political constraints were the

---

[43] *See supra* text accompanying part I, notes 37-41.

[44] South Dakota v. Dole, 791 F.2d 628, 631 (8th Circ. 1986).

[45] *Id.*

[46] *Id.*

[47] Giving appropriate deference to Congress's view of the national welfare and the means necessary to promote that welfare, we believe Congress reasonably could have concluded the problem of young adults drinking and driving is not a purely local or intrastate concern but rather is a concern of interstate and national proportions. We further believe Congress, in its reasoned discretion, could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, we conclude Congress's decision to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age of twenty-one is reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age. Leaving aside any specific constitutional prohibition, we find that section 158 falls within the scope of Congress's power under the spending clause. (citations omitted)

South Dakota v. Dole, 791 F.2d 628, 632 (8th Circ. 1986).

[48] South Dakota v. Dole, 791 F.2d 628, 634 (8th Circ. 1986).

weapon of choice in preventing Congressional overreaching.[49] Finally, the court noted that there was no restructuring of the state government involved in this statute:

> Regardless, South Dakota has failed to demonstrate how section 158 forces the state to restructure its governmental system or functions or impairs the state's integrity or ability to function effectively in the federal system. Further, South Dakota can hardly claim either a vested right in the federal funds being offered or the right to set the conditions on which the money will be provided. Rather, as stated above, South Dakota is entirely free to reject Congress's offer of federal highway funds and exercise in any way it chooses its authority to establish a minimum drinking age.[50]

The Supreme Court upheld this restriction on funds by Congress as constitutional. In an opinion authored by Chief Justice Rehnquist[51] followed the reasoning of the Court of Appeals, and found that the restrictions imposed on the spending power in this case were "directly related to one of the main purposes for which highway funds are expended--safe interstate travel."[52] But in a footnote, the court declined to determine the limits of how conditional grants of Federal funds are applied by stating:

> Our cases have not required that we define the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power. Amici urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. ...Because petitioner has not sought such a restriction, ...and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.[53]

The court continued to observe that there is a higher threshold of what the Federal government can do in the area of conditions on Federal grants to compel state action than as to what Congress can do directly. Conditions on funds have been authorized to include limitations on the political actions of

---

[49] *Id.*

[50] *Id.*

[51] South Dakota v. Dole 483 U.S. 203 (1987).

[52] South Dakota v. Dole 483 U.S. 203, 208 (1987).

[53] South Dakota v. Dole at 209, n. 3.

local officials,[54] and applying Federal wage standards to municipally owned mass transit systems.[55] The general thrust of the court's opinion in this area is that states are not compelled to take money if they don't want to do what the Federal government requires.

There may be restrictions on the use of the spending power to achieve ends that may not be directly achievable. The court stated that conditioning the use of funds "on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power."[56] Finally, the court noted that the use of "financial inducement[s] offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[57]

This line of cases cited by the Supreme Court begs the question as to whether Congress has gone too far in utilizing the spending clause to compel the production of state permit programs, and in the case of Virginia, is this power going beyond the constitutional bar that the Supreme Court speaks of in upholding the national minimum drinking age. The sanctions[58] that are to be imposed for failure to have an approved program in place after a disapproval include a near total prohibition on Federal transportation and highway grants,[59] or offsets of new or modified sources.[60] In comparison to the ten per cent cut-off of funds imposed by the national minimum drinking age for failure to have a drinking age of twenty-one, the loss of funds for transportation projects could be huge.

---

[54] *See* Oklahoma v. Civil Service Commission 330 U.S. 127 (1947) *cited in* South Dakota v. Dole at 210.

[55] *See* Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985).

[56] South Dakota v. Dole at 210-211.

[57] Steward Machine Co. v. Davis 301 U.S. 548, 590 (1937) *quoted in* South Dakota v. Dole at 211

[58] CAA §502(d)(2)(B), 42 U.S.C.A §7661a(d)(2)(B) (1983-1995).

[59] CAA §179(b)(1), 42 U.S.C.A §7509(b)(1) (1983-1995).

[60] CAA §179(b)(2), 42 U.S.C.A §7509(b)(2) (1983-1995).

This is not a minor change in the law, but in some cases, the Federal government is potentially seeking to change the ability of the states to regulate access to their own courts. In Virginia's case, it is conceivable that persons who would not have standing under state law, would now be given standing to sue. The Court of Appeals noted that there was no compulsion to change the structure of South Dakota's "governmental system or functions."[61] Does the change required by EPA in furtherance of Subchapter V public participation reach this level?

Furthermore, what is the connection between the denial of transportation funds and the permitting of stationary sources, which do not move? Is this a proper use of the spending power, or does it go too far?

[61] South Dakota v. Dole, 791 F.2d 628, 634 (8th Circ. 1986).

VII

Indian Lands, Litigation and the Future

A. Indian Lands

The Clean Air Act authorizes the Administrator of EPA to treat Indian Tribes as the functional equivalent of states and called for the issuance of regulations governing the treatment of tribes under the Clean Air Act no later than eighteen months after November 15, 1990.[1] On August 25, 1994, well after this statutorily created deadline for action in this area, EPA issued a notice of proposed rulemaking to affect this statute.[2] In this proposed rulemaking, EPA proposed to grant "approved Tribes regulatory authority over all air resources within the exterior boundaries of their reservations."[3] EPA noted that it was already supporting these Tribal lands by administering a permit program that regulated "New Source Review."[4] EPA then proposed to begin a regulatory process for tribes wherein it would determine the appropriateness of treating tribes as states "TAS" process.[5]

The proposed rule[6] which would establish Clean Air Act authority for tribes has not been the subject of a final rulemaking as of July 31, 1995. This rule is significant for what it proposes to exclude from application to Tribes under the Clean Air Act. Among the provisions of the Clean Air Act that Tribes would not need to comply with, include, deadlines related to many National Ambient Air Quality Standards related requirements;[7] imposition of sanctions;[8] visibility implementation plan

---

[1] CAA §301(d)(2)(A-C), 42 U.S.C.A. §7601(d)(2)(A-C) (1983-1995).

[2] 59 Fed. Reg. 43,956 (1994).

[3] 59 Fed. Reg. 43,960 (1994).

[4] *Id.*

[5] 59 Fed. Reg. 43,962 (1994).

[6] 59 Fed. Reg. 43,980-43,983 (1994) (to be codified at 40 C.F.R. Part 49) (proposed August 25, 1994).

[7] 59 Fed. Reg. 43,980 (1994) (to be codified at 40 C.F.R. §49.4 (a)) (proposed August 25, 1994).

deadlines;[9] or criminal enforcement authority,[10] but Criminal enforcement authority would be handled by the Federal government.[11] Tribes may request excusal from being treated the same as a state[12] and a tribe must meet the eligibility requirements established in the proposed regulation, which includes: recognition as an Indian Tribe by the Interior Secretary;[13] a governing body that can execute governmental functions[14] including "management and protection of air resources...within the Tribe's jurisdiction,"[15] and a determination by the EPA Regional Administrator that the Tribe is "capable ...of carrying out the functions ...of the Clean Air Act[.]"[16] The Tribe must request approval for program authorization by demonstrating that it has the legal authority and capability of executing the act.[17] EPA has procedures by which it will evaluate the proposed program, receive comments on the programs and evaluate the comments and jurisdiction of the proposed program.[18]

As noted earlier, Washington State,[19] Wisconsin,[20] and Arizona[21] either submitted requests to exercise control over sources located within Indian Lands, or passed laws which attempted to do so. The proposed regulation by EPA clearly seeks to have tribes enforce their own programs, or in the alternative, have EPA do it for them. While the final rulemaking in this area is pending, it will be

---

[8] 59 Fed. Reg. 43,980 (1994) (to be codified at 40 C.F.R. §49.4 (c)) (proposed August 25, 1994).

[9] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.4 (e)) (proposed August 25, 1994).

[10] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.4 (g)) (proposed August 25, 1994).

[11] 59 Fed. Reg. 43,982 (1994) (to be codified at 40 C.F.R. §49.8) (proposed August 25, 1994).

[12] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.5) (proposed August 25, 1994).

[13] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.6 (a)) (proposed August 25, 1994).

[14] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.6 (b)) (proposed August 25, 1994).

[15] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.6 (c)) (proposed August 25, 1994).

[16] 59 Fed. Reg. 43,981 (1994) (to be codified at 40 C.F.R. §49.6 (d)) (proposed August 25, 1994).

[17] 59 Fed. Reg. 43,981-43,982 (1994) (to be codified at 40 C.F.R. §49.7 (a-c)) (proposed August 25, 1994).

[18] 59 Fed. Reg. 43,981-43,982 (1994) (to be codified at 40 C.F.R. §49.8 (a-i)) (proposed August 25, 1994).

[19] *See* discussion *supra* part IV.A, notes 38-42 and accompanying text.

[20] *See* discussion *supra* part IV.F, notes 124-125 and accompanying text.

[21] *See* discussion *supra* part IV.V, notes 472-474 and accompanying text.

important in determining the final outcome for some state programs. The status of these tribal areas is important because, if they are treated as states, then, the objections to proposed permits by any of these areas would be accorded the protections of "affected states."[22]

The policy questions that come to mind in this area are whether or not EPA and the tribes that would obtain this authority would have the resources to carry out a permit program? What would be the economic effect of these programs, whether run by EPA or the tribes themselves? Should EPA be trying to encourage the states and the tribes enter into compacts to implement Subchapter V? Would this be a more practical solution? State courts are often more accessible than Federal courts. Would state legal authorities be better positioned to deal with these problems and place a different priority on them than the U.S. Attorney's office in a particular area? Would the encouragement of compacts do a better and more efficient job of regulating pollution, and fostering economic growth at the same time, especially since these people have to live with one another?

B. Litigation

As of July 31, 1995, there had been a decision in one case could have serious implications for Subchapter V.[23] The D.C. Circuit Court of Appeals acted on a consolidated petition which challenged regulations implementing Section 112 of the Clean Air Act. The appellants were General Electric and trade associations representing the mining and related industries; the paper manufacturing industry; the chemical manufacturing industry and the petroleum industry.[24] The litigation concerned a series of ruelmakings designed to establish what a "major source" is for terms of compliance with Section 112.[25]

---

[22] *See* CAA §505(a)(2), 42 U.S.C.A. §7661d(a)(2) (1983-1995) *and* 40 C.F.R. §70.8 (1994). *See also supra* Part II.E.

[23] *See* National Mining Association, et. al. v. United States Environmental Protection Agency, --- F3d. ---, 1995 WL 427894, (D.C. Circ. 1995) hereafter NMA v. EPA.

[24] NMA v. EPA, 1995 WL 427894 at *1

[25] *See* 57 Fed. Reg. 31,756 (1992); 58 Fed. Reg. 63,941 (1993); 58 Fed. Reg. 42,760 (1993) *and* 59 Fed. Reg. 12,408 (1994) *cited in* NMA v. EPA at *1-*2.

This decision will be significant in determining who is subject to Subchapter V regulations, and thus who must obtain a permit, or who are excluded from this requirement for the time being, under Subchapter V.[26]

There were three challenges to the proposed rulemaking; first, whether total emissions from an entire plant may be considered in determining whether a plant is a "major source" or whether "only those emissions from equipment in similar industrial categories"[27] should be considered in making this determination. Second, whether "fugitive emissions" should be considered in making the "major source" determination.[28] Third, whether EPA exceeded its authority by authorizing the creation of synthetic minors only through the establishment of "'federally enforceable' emission controls and limitations."[29]

EPA's proposed definition of a major source was upheld by the court. It found that EPA could prohibit the balkanization of plants into different sources to avoid the permitting process.[30] EPA's inclusion of fugitive emissions in the calculating total emissions was also upheld as a reasonable interpretation of the statute by the agency.[31]

EPA did not fare so well in the area of mandating Federally enforceable state permit programs as the only legal controls in determining whether a source is not a "major" source. The court did not find the agency's arguments compelling that there be the creation of a national standard in this area.

> [T]he [1990] amendments do create a national substantive standard, namely categories of sources (major and area) and corresponding technological compliance measures. By no means does that suggest that Congress necessarily intended for state emissions

---

[26] *See* 40 C.F.R. §70.3(b)(1) (1994).

[27] NMA v. EPA at *2.

[28] *Id.*

[29] *Id.*

[30] *Id.* at *6.

[31] *Id.* at *9.

> controls to be disregarded in determining whether a source is classified as "major" or "area" under that national standard. Nor did Congress mandate that EPA assume the administration and enforcement of all governmental efforts at emissions limits. If such administration and enforcement is necessary to ensure that controls are effective in the context of the extant regulatory environment, EPA has certainly not made that case and has not indicated how that consideration supports its claim that its interpretation of the statute is reasonable.[32]

The court upheld EPA by stating that "EPA's definition of 'major source' without respect to source categories or two-digit SIC codes is reasonable, as is its requirement that fugitive emissions be included in a source's aggregate emissions in determining whether the source is major."[33] The court then granted the petition for review with respect to the use of state controls, that were not federally approved in determining whether or not a particular source was to be included in ascertaining its particular status.[34]

C. The Future

The permit programs under Subchapter V, whatever their approval status will constantly be undergoing change. The litigation over Section 112 and the uncertainty of the rulemaking process in this area mean that EPA, the States, and the regulated industries will have to cope with this change. The status of the programs for Indian country will be of significance in an ever changing political environment.

The issue raised in Virginia[35] as to standing, and the constitutionality of compelling change in state laws still must be resolved. In the present environment, what would Congress do if the standing definition envisioned by Virginia were authorized. Clearly, public participation in the permit process would be limited. If the use of sanctions were deemed to be "compulsion" as opposed to a benefit that

---

[32] *Id.* at *14.

[33] *Id.*

[34] *Id.*

[35] *See supra* Part VI.

could be declined, and EPA lost the use of that tool, would the states be inclined to change their permit programs?

The cost of meeting permit requirements for some facilities will no doubt be huge. The fight to limit application of this law shows that the stakes are high, not only for meeting the permit requirements themselves, but for controls that might be required in the future. The litigation that has occurred to date[36] in this area could foretell future problems. Industry will use the regulatory and litigation process to avoid permitting if possible. How will industry try to avoid permitting requirements? Possibilities include the creation of synthetic minor sources through state permitting programs. If EPA's desire to maintain strict Federal control through Federally enforceable permit programs is not upheld by the courts, and states are free to set their own standards in these areas, then what will be the consequences of EPA's potential inability to control these programs?

EPA has only applied the regulations in this area to "major sources." One possibility is that EPA could then use its authority under Subchapter V to extend the Part 70 program to other sources. Will the regulatory burden be so severe, if EPA attempts to do this, that it creates a raft of public resistance to the entire program? There should also be some economic analysis of the impact of this program some time in the future. Inevitably, the permit program may become subject to scrutiny if the cost of counting and reporting the pollutants becomes so excessive that it impacts employment, or industry alleges that it impacts employment.

When the final rules on Section 112 implementation are issued, if ever, then all of the states that have programs which have been reviewed by EPA and granted either interim or full approval will have to revisit their regulations and statutes to ensure that the programs are in compliance. In addition, EPA will have to quantify the definition of a "Title I modification," and review the affects of this

---

[36] *See supra* Part VII.B.

definition on all of the programs that EPA has already acted on. EPA will have to determine when these changes will become effective, and will no doubt have to give the states time to react. In the present political environment, how complex will the regulations be, and how long will it take to litigate the issues generated by these programs?

Another disturbing potential impact of this program is the potential for conflict among the states. States are given the first real opportunity with this statute to use the air pollution permitting process to hinder economic improvement in adjoining states. This ability also applies to the public at large, through the expanded citizens involvement provisions in the statute. This statute provides opportunities to those who would like to prevent development or industrial expansion. Is it possible that these provisions could effectively create so many obstacles, costs, and other hurdles, that industry would develop outside the United States, where practicable?

The permitting program should be monitored by Congress and EPA to insure that it effectively and fairly spreads the costs of cleaning the air. The permitting program, especially in the area of Hazardous Air Pollutants, still needs great explanation. EPA has almost always failed to meet statutorily established deadlines for the promulgation of effective regulations in this area. The states have had to change their laws and regulations to comply with both the statute and regulations implementing Subchapter V. There are far more than fifty approaches to implementing this law and the sheer variety of state regulations has shown that coping with this law will not be easy. Would a model rule make implementation of Subchapter V easier for the states, industry, the public and EPA?

Only time will tell if this program is working as intended.